83-730

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WATER TRANSPORT ASSOCIATION,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA, CSX CORPORATION,
TEXAS GAS RESOURCES CORPORATION, and
EASTERN COAL TRANSPORTATION CONFERENCE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the provisions of the Panama Canal Act prohibiting a railroad from acquiring any interest in a water carrier prior to a full hearing and determination by the Interstate Commerce Commission that competition will not be reduced and that the transaction is in the public interest prohibit the second largest railroad in the United States from acquiring a 100% ownership interest in the nation's largest inland water carrier through a voting trust prior to such a hearing and determination.

PARTIES

All parties are named in the caption.*

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* In accordance with Rule 21.1(b) of the Rules of the Supreme Court, the members of the Water Transport Association and their parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates are set forth beginning at page 113a of the Appendix.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, the Water Transport Association ("WTA"), respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on August 4, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals majority (Wald and Scalia, JJ.) and the dissenting opinion of Judge Harold H. Greene, sitting by designation, are not officially reported, but are reproduced at pp. 1a and 33a of the Appendix to this petition, respectively. The unreported

decision of the Interstate Commerce Commission denying the WTA's petition for a declaratory order is reproduced at p. 51a of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on August 4, 1983. Appendix, p. 68a. A petition for rehearing with suggestion for rehearing en banc was filed on Saturday, August 6, 1983 and was denied the same day, although five of the ten judges of the court did not participate in considering the suggestion for rehearing en banc, and a sixth judge voted to defer consideration of the rehearing en banc. Appendix, pp. 71a, 72a. A petition for reconsideration of the order denying rehearing en banc was filed on August 13, 1983, and was denied on October 28, 1983. Appendix, p. 74a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1976).

STATUTES AND REGULATIONS INVOLVED

The principal statutory provision involved is Section 11 of the Panama Canal Act of 1912 [1] (codified as amended at 49 U.S.C. § 11321 (Supp. V 1981)). It provides in relevant part that a rail carrier, or a person controlling a rail carrier, "may not own, operate, control or have an interest in a water common carrier or vessel carrying property or passengers on a water route with which it does or may compete for traffic" unless the Interstate Commerce Commission has determined after a "full hearing" that such "ownership, operation, control or interest will still allow that water common carrier or vessel to be operated in the public interest advantageously to interstate commerce and that it will still allow competition, without reduction, on the water route in question." The full text of the statute as presently codified is reproduced at p. 75a of the Appendix.

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[1] Act of Aug. 24, 1912, ch. 390, § 11, 37 Stat. 566.

Section 11 of the Panama Canal Act as enacted is reproduced at p. 77a of the Appendix. Sections 5(15)-(17) of the Interstate Commerce Act, 49 U.S.C. §§ 5(15)-(17) (1976), which contained the relevant provisions of the Panama Canal Act, as amended, prior to their 1978 recodification without substantive change in Section 11321, is reproduced at p. 79a of the Appendix.[2]

Sections 11343 and 11344 of the Interstate Commerce Act, 49 U.S.C. §§ 11343-44 (Supp. V 1981), which prohibit an ICC-regulated carrier from acquiring "control" of another such carrier without Commission approval are reproduced at p. 81a of the Appendix. The Voting Trust Rules, 49 C.F.R. § 1013 (1982), promulgated by the Commission to permit persons "to acquire interests in regulated carriers" [3] while "avoid[ing] an unlawful control violation" [4] under Sections 11343-44 are reproduced at p. 86a of the Appendix.

STATEMENT

Under the Panama Canal Act provisions of the Interstate Commerce Act, 49 U.S.C. § 11321 (Supp. V 1981), a railroad or a person controlling a railroad is forbidden to "own, operate, control, or have an interest in" a competing water carrier or vessel without first obtaining Interstate Commerce Commission approval after a full hearing. This case involves the application of the Panama Canal Act prohibition to the acquisition by CSX Corporation ("CSX"), a holding company whose subsidiaries now comprise the nation's second largest railroad system, of

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[2] The entire Interstate Commerce Act, including the Panama Canal Act, was recodified in 1978, but such recodification was not intended to make any substantive change in the law. Act of Oct. 17, 1978, Pub. L. No. 95-473, §§ 1, 2, 92 Stat. 1337 (codified as amended at 49 U.S.C. § 10101 (Supp. V 1981)). For this reason, reference to the precodification text of the Panama Canal Act is appropriate to ascertain its meaning.

[3] 44 Fed. Reg. 59909 (1979).

[4] 49 C.F.R. § 1013.1(a) (1982).

the nation's largest inland water carrier, the affiliates of Texas Gas Resources Corporation ("Texas Gas") known as American Commercial Lines, Inc. ("ACL"). As shown on the maps appended to this petition (pp. 89a, 90a), the routes and geographic regions served by ACL in many instances overlap and parallel those served by CSX's railroad subsidiaries.

CSX and ACL are giants in their respective industries. In 1982, CSX had revenues from rail freight operations in excess of $4.3 billion. CSX blankets a 22-state area east of the Mississippi, operating from the Great Lakes to the Gulf of Mexico and from the Atlantic Coast to the Mississippi River. CSX is the nation's largest coal carrier, transporting more than 224,000,000 tons of coal in 1982. ACL's barging operations constitute one of the principal integrated water transportation businesses on the Mississippi River and its tributaries, covering the inland waterway system, extending from Pittsburgh in the east to Tulsa in the west, from Minneapolis in the north to New Orleans in the south and across the Gulf of Mexico. Like CSX, ACL transports a huge volume of traffic, comprised of many of the identical commodities transported by CSX, including coal, grain and chemicals. In 1982, ACL's traffic amounted to 18.4 billion ton miles. In the barge transport industry, which includes many family-owned and run operations, ACL is a dominant force. There is strong competition for transportation of bulk commodities between CSX and water carriers, including ACL.

A. The Tender Offer

On June 6, 1983, Coastal Corporation ("Coastal") commenced a tender offer for the common stock of Texas Gas. To thwart the Coastal offer, Texas Gas entered into an agreement with CSX which resulted in CSX's making a competing tender offer for all of the shares of Texas Gas. On June 23, 1983, Texas Gas agreed to pay Coastal $18

million in exchange for Coastal's withdrawal of its tender offer.

The agreement between CSX and Texas Gas provided that the shares of ACL would be placed in a voting trust pending proceedings before the ICC. CSX and Texas Gas acknowledged in the agreement that the use of a voting trust might not be "legally possible." Although ICC regulations permit the use of a voting trust "to avoid an unlawful *control* violation" under 49 U.S.C. § 11343,[5] the Commission had never determined that a voting trust permitted a rail carrier to acquire a water carrier without violating the more encompassing prohibition of the Panama Canal Act provisions contained in Section 11321. Appendix, p. 57a. Texas Gas nevertheless filed a voting trust agreement with the ICC on June 10, 1983, which was superseded by a revised agreement filed on June 14, 1983. Appendix, p. 91a. On June 20, 1983, at the request of CSX and Texas Gas, the ICC staff issued an "informal nonbinding" opinion letter that the revised voting trust agreement would "insulate" CSX and Texas Gas "from violation of the Commission's policy against an unauthorized acquisition of control of a regulated carrier." Appendix, pp. 106a-107a. The staff did not determine that the voting trust arrangement would allow CSX to avoid acquiring an "interest" prohibited by the Panama Canal Act.

B. The Proceedings Before the ICC

On June 23, 1983, the WTA on behalf of itself and its members[6] filed with the ICC a petition seeking a declaratory order that the CSX-Texas Gas voting trust

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[5] 49 C.F.R. § 1013.1(a) (1982) (emphasis supplied).

[6] The membership of the WTA consists of certificated water carriers that are actively engaged in serving the public on the coastal and inland waterways of the United States. They compete with both the railroads owned by CSX and the bargeline subsidiaries of Texas Gas, in general and on specific routes.

agreement would not insulate CSX from a violation of the Panama Canal Act if it proceeded to acquire an "interest" in the Texas Gas water carrier affiliates. The WTA's petition pointed out that Section 11321 prohibits a railroad not only from acquiring "control" of a competing water carrier, but also from acquiring an "interest" in such a water carrier. For this reason, the WTA contended that a voting trust arrangement could not prevent a violation of Section 11321 because the Commission's voting trust rules, 49 C.F.R. § 1013 (1982), relate only to unauthorized acquisitions of "control." The WTA's petition also asserted that the use of a voting trust arrangement would defeat the plain intent of the Panama Canal Act by denying the WTA and other interested parties their statutory right to a "full hearing" *before* CSX's acquisition of a 100% interest in the Texas Gas water carrier subsidiaries. Finally, the WTA contended that the voting trust agreement was inadequate, in any event, because of uncertainties regarding its scope, interlocking corporate directors, the presence of continuing financial interests, and the absence of restrictions on anticompetitive communication and cooperation between CSX and ACL.

Six days later, on June 29, 1983, to accommodate the expediency of the tender offer, the ICC denied WTA's petition and its June 27, 1983 motion to enjoin CSX from acquiring Texas Gas shares in violation of the Panama Canal Act.[7] The Commission admitted that its "prior

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[7] When the WTA filed its declaratory order petition on June 28, 1983, CSX was not scheduled to begin purchasing any Texas Gas shares until midnight on July 7, 1983. Late on Friday afternoon, June 24, 1983, counsel for the WTA (as well as the ICC staff) learned that CSX had announced that it was accelerating its timetable and would instead begin to purchase shares at midnight on Wednesday, June 29, thus necessitating the WTA's motion.

On the morning of June 29, 1983, because the ICC had not ruled on the WTA's petition and motion, the WTA filed suit against CSX in the United States District Court for the District of Columbia,

decisions applying [the Panama Canal] statute have held that its limitation extends to *any* interest in a competing water carrier, not merely to an interest enabling a railroad to exercise control of a water carrier or to influence directly a water carrier's operations." Appendix, p. 57a (emphasis supplied). Nevertheless, in order to avoid "interfer[ing] in the . . . marketplace" (Appendix, p. 51a), the Commission permitted the voting trust arrangement because other provisions of the statute permit a railroad to maintain an interest in a water carrier where the two do not compete (*see* Appendix, p. 66a) or where maintenance of the interest will not reduce competition. (*See* Appendix, p. 63a) The Commission concluded that "an interest is [not] prohibited by section 11321 . . . [unless] the relationship enables the railroad to adversely affect competition from water carriers . . . ." Appendix, p. 63a. The Commission, however, reached this conclusion even though the statute provides that a determination that a railroad and a water carrier do not compete or that a railroad's interest in a water carrier will not reduce competition can be made only after a "full hearing," and no hearing of any kind was held regarding the present transaction.

C. Proceedings in the Court of Appeals

On the WTA's appeal from the ICC's decision, a sharply divided panel of the Court of Appeals affirmed.[8] The

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seeking injunctive relief against CSX's purchase of any Texas Gas shares until the WTA had been accorded its right to a hearing by the ICC. Following the ICC decision on the afternoon of June 29, the District Court (Gasch, J.) entered a temporary restraining order barring the acquisition of Texas Gas shares by CSX in order to enable the WTA to appeal the ICC's decision. Water Transport Ass'n v. CSX Corporation, No. 83-1874 (D.D.C. June 29, 1983). The Court of Appeals denied CSX's motion for summary reversal of Judge Gasch's order and denied its petition for a writ of mandamus. Water Transport Ass'n v. CSX Corporation, Nos. 83-1715, 83-1716 (D.C. Cir. June 30, 1983).

[8] On July 8, 1983, the Court of Appeals had enjoined CSX from purchasing any Texas Gas shares pending a determination on the

panel majority (Wald and Scalia, JJ.) expressly refused to approve "all of the Commission's broad language." Appendix, p. 3a; *see* Appendix, p. 10a n.10. The majority considered it significant, however, that in two prior ICC cases under the Panama Canal Act, the parties had entered into purchase agreements prior to seeking ICC approval. Although in each of those cases the agreement remained entirely executory, and no party to the ICC proceedings had contended that the existence of the purchase agreement itself created a prohibited "interest,"[9] the majority characterized the difference between a purchase contract contingent on ICC approval and a voting trust arrangement as only a "short step" (Appendix, p. 27a), and concluded on that basis that "the statutory phrase 'any interest whatsoever' cannot be taken literally."[10] Appendix, p. 25a.

Based on the twin premises that the statute does not mean what it says and that the same treatment necessarily must be given to both a wholly-executory purchase agreement contingent on ICC approval and 100 percent ownership subject to a voting trust arrangement, the majority concluded that the latter must be allowed or else "[t]he Canal Act purpose to permit the ICC to approve rail-water mergers that are in the public interest would be frustrated . . ." Appendix, p. 29a.

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merits, and ordered that the appeal be heard on an expedited basis. On July 11, 1983, the Chief Justice denied CSX's application for relief from the interlocutory injunction. In the Court of Appeals, the Eastern Coal Transportation Conference, an association of shippers, intervened in support of the WTA. CSX and Texas Gas intervened as respondents.

[9] *See* Appendix, pp. 22a-23a; *see also* Appendix, p. 41a.

[10] The quoted language, "any interest whatsoever," is from the text of Section 5(15) of the Interstate Commerce Act prior to its recodification in Section 11321 in 1978. *See* Appendix, p. 79a. As indicated at note 2, *supra*, the recodification did not change the substantive meaning of the statute.

District Judge Harold H. Greene, sitting by designation, dissented. Judge Greene emphasized that Section 11321 provides that "a [rail] carrier . . . may not own, operate, control, *or have an interest in* a water common carrier . . . with which it does or may compete for traffic," and that "[t]he Commission regard[ed] the addition of the term 'interest' as having so little significance that it treat[ed] 'interest' and 'control' as essentially interchangeable, and the term 'interest' for practical purposes as mere surplusage." Appendix, p. 38a (emphasis in original).

Judge Greene also reasoned that both the Congressional purpose and the structure of the statute required rejection of the ICC's interpretation. He recognized that "[t]here is a long history in this country of attempts by railroads to acquire surface freight transport domination by attempting to drive water carriers out of business," that "[t]he Panama Canal Act is aimed directly at these aggressive actions," and that "[t]he flat prohibition of railroad takeovers in section 11321 is an expression of this congressional concern." Appendix, p. 34a. Although he agreed with the majority that Congress had intended to permit railroad-water carrier mergers "where it could be demonstrated that competition would not be harmed and that the joint rail-water operation would be in the public interest," he emphasized that "Congress also specified that such a determination was to be made only after a hearing." Appendix, p. 35a. In view of this hearing requirement, Judge Greene rejected the ICC's construction of the term "interest," stating:

> The Commission's construction of the statute in this case stands this fairly straightforward statutory scheme on its head. Instead of making its determination regarding the appropriateness of the acquisition within the framework of the prior hearing required by subsection (c), the ICC transfers the decision-making process to subsection (a) by the simple device of determining at the very outset of its consideration that a voting trust is not an "interest" within the meaning of the Act.

Appendix, p. 35a. Judge Greene also recognized that "[t]his . . . is by any measure a massive takeover of a water carrier by a railroad" (Appendix, p. 33a), and that

> if, by means of the establishment of a voting trust, this very large merger is allowed to take place without a prior hearing, the same procedure will successfully be used in every future corporate takeover of a water carrier by a railroad . . . . [T]he statutory requirement for a hearing in advance of Commission action will become a dead letter.

Appendix, p. 45a.

Finally, Judge Greene rejected the majority's concern that enforcing the terms of the statute might require railroads to acquire water carriers by means "less efficient" than tender offers. Appendix, p. 46a. He noted that "[m]echanisms for acquisition other than tender offers do exist" (Appendix, p. 45a), but stated that even if they did not, the result could not be different:

> In the end, a choice may have to be made among the various objectives that may be imputed to the Congress. The majority is concerned about the practical difficulties railroads may encounter in acquiring water carriers if "interest" is given its natural meaning and if a hearing is required in advance, and it suggests that this might complicate achievement of the legislative objective of allowing some takeovers . . . . But plainly the dominant congressional purpose is embodied in the prohibition against the acquisition of a water carrier by a competing rail carrier. It seems to me that, if in the process of statutory construction one purpose or the other must be given preference, the general prohibition should be preferred over the limited escape clause.

Appendix, pp. 47a-48a.[11]

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[11] In its August 4, 1983 judgment (Appendix, p. 68a), the Court of Appeals extended its injunction until August 5, 1983, and it later

REASONS FOR GRANTING THE WRIT

A. A Railroad's Acquisition of a 100% Ownership Interest in a Competing Water Carrier Through a Voting Trust, Prior to a Full Hearing and Specific Findings by the Interstate Commerce Commission, is Prohibited by the Panama Canal Act

The Panama Canal Act prohibitions involved in this case were Congress' response to a long history of railroad abuse of the ownership and control of water carriers. "[R]ailroads [had] bought up water competition and by applying their economic leverage, reduced water tariffs to the point of forcing independent water carriers off the rivers and lakes. The plain tendency of this acquisition scheme was to create a rail monopoly over water traffic." *American Waterways Operators, Inc. v. United States*, 386 F. Supp. 799, 803 (D.D.C. 1974), *aff'd mem.*, 421 U.S. 1006 (1975); *see also Lake Line Applications Under Panama Canal Act*, 33 I.C.C. 699, 712 (1915). The House Report to the Panama Canal bill referred to this history of abuse:

> The apprehension of railroad-owned vessels driving competition from the canal may or may not be exaggerated, but it is certain that the evil, which is only anticipated there, already exists in the coastwise trade on both coasts, as well as on our lakes and rivers. The evil is prevalent, recognized, and complained of. The proper function of a railroad corporation is to operate trains on its tracks, not to occupy the waters with ships in mock competition with itself, which in reality operate to the extinction of all genuine competition. In answering demands for

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extended the injunction again to August 6, Appendix, pp. 108a-109a. On August 6, the Court of Appeals denied WTA's motion to further extend the injunction (Appendix, p. 110a), as did Justices Brennan and Powell. *See* Appendix, p. 111a-112a. On August 7, CSX acquired Texas Gas and placed the shares of ACL in the voting trust. On September 29, 1983, the merger was consummated.

> the exclusion of railroad-owned ships from the canal . . . the committee thinks it wise, just, and opportune to broaden the amendment so as to serve the higher, wider, more pressing, and more necessary purposes of excluding the railroads from operating vessels in competition with their tracks anywhere in the coastwise trade generally or in the lake [sic] and rivers.

H.R. Rep. No. 423, 62d Cong., 2d Sess. 12 (1912).

Judge Greene correctly recognized that two features of the legislation Congress enacted in response to the railroads' destruction of genuine competition on the waterways are key to its proper interpretation. First, Congress could have enacted legislation simply prohibiting or limiting railroad "ownership" or "control" of water carriers. It did not do so. Congress instead made it unlawful for any railroad to "own, lease, operate, control, *or have any interest whatsoever* (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, *or in any other manner*)" in a competing water carrier. 49 U.S.C. § 5(15) (1976) (emphasis supplied). The statutory prohibition is as broad and inclusive as any can be, and Congress fully understood its scope. The "slightest interest," even "[r]ailroad ownership of 1 share" of a water carrier's stock, is enough to activate the statutory prohibition.[12] In *Nicholson Universal Steamship Co. Ownership*, 248 I.C.C. 43, 67 (1941), Chairman Eastman stated in his concurring opinion:

> [T]hat the authors of this prohibition intended to, and did, use language so broad and comprehensive that all such obstacles [concerning proof of control or influence] to the [complete] enforcement of the complete separation [between railroads and competing water carriers] which they desired would be overcome.

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[12] 48 Cong. Rec. 9232, 11055 (1912) (remarks of Sen. Brandegee); *see also id.* at 6928 (remarks of Rep. Malby); *id.* at 10458 (remarks of Sen. Smith).

As the ICC earlier stated, "[t]here is nothing in the language of the statute that would warrant" restricting the statutory prohibition to "such an interest as enables a railroad to control or exercise a direct influence over the activities and policies of the water carrier." *Investigation of Seatrain Lines, Inc.*, 206 I.C.C. 328, 333 (1935). "The interest which a rail carrier is forbidden to have in a water carrier with which it does or may compete is *any* interest and the prohibition is absolute . . . ."[13] *Id.* at 333 (emphasis in original).

Second, Congress recognized that in some limited circumstances, the public interest might be served by joint rail-water operations, but it conditioned the ICC's authority to permit railroads to acquire or maintain interests in water carriers on exacting substantive and procedural standards. ICC approval may be granted only if "the Commission finds that [such] ownership, operation, control, or interest will still allow that water common carrier or vessel to be operated in the public interest advantageously to interstate commerce and that it will still allow competition, without reduction, on the water route in question." 49 U.S.C. § 11321(b) (Supp. V 1981). Moreover, such approval may be granted "only after a full hearing."[14] 49 U.S.C. § 11321(c) (Supp. V 1981).

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[13] The statutory language remained unchanged until the 1978 recodification of the Interstate Commerce Act, at which time the words "have an interest in" were substituted for "have any interest whatsoever" and the following parenthetical. The revision note makes clear that the substitution was made because the new language was "more inclusive." 49 U.S.C. § 11321 note (Supp. V 1981). In addition, as noted above, the recodification was not intended to change the substance of the statute. Act of Oct. 17, 1978, Pub. L. No. 95-473, §§ 1, 2, 92 Stat. 1337 (codified as amended at 49 U.S.C. § 10101 (Supp. V 1981)). The original language and congressional understanding are therefore authoritative with respect to congressional intent as to the scope of the statutory prohibition.

[14] As originally enacted, the statute further limited the ICC's authority to approve joint rail-water operations existing as of July 1, 1914. In 1940, Congress amended the statute to permit

As these provisions and the statute's structure demonstrate, Congress' plain intention was to create a prohibition of the broadest possible scope and then permit the Commission in narrow circumstances, and subject to stringent procedural requirements, to grant exceptions to the general prohibition. The Commission cannot make any exceptions prior to conducting a full hearing and making the specific findings respecting competition and public interest set forth in the Panama Canal Act.[15] No "incidental authority", for an "interim" period or otherwise, as found by the majority (Appendix, p. 3a), can be derived from the Commission's power to create exceptions to the statutory prohibition, since that power is conditional upon a prior hearing. Under the precedent established by the Court of Appeals, there is nothing to stop any railroad in the future from by-passing the clear Congressional prohibition of a railroad's acquiring an interest in a water carrier through the voting trust device.

In Judge Greene's words, "[t]he Commission's construction of the statute in this case stands this fairly

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Commission approval of new rail-water relationships, but only subject to the same substantive and procedural limitations as were contained in the original Act. National Transportation Policy, Pub. L. No. 76-785, 54 Stat. 898 (1940) (codified as amended at 49 U.S.C. § 10101 (Supp. V 1981)). As then-Senator Truman stated, "[t]he Panama Canal Act is still the law; it is in the law as the Senate committee wanted it to be there, and is still the Panama Canal Act, just as it always has been." 86 Cong. Rec. 11541 (1940).

[15] In the Act as it existed in 1940, Congress provided:

> Notwithstanding the provisions of paragraph (15) of this section [the prohibition], the Commision shall have authority, upon application of any carrier . . . *and after hearing*, by order to authorize such carrier to acquire ownership of . . . an interest . . . if the Commission shall find that the . . . acquisition of such . . . interest will not prevent such common carrier by water . . . from being operated in the interest of the public and with the advantage to the convenience and commerce of the people and that it will not exclude, prevent, or reduce competition on the route by water under consideration.

49 U.S.C. § 5(17) (1976). (Emphasis supplied.)

straightforward statutory scheme on its head." Appendix, p. 35a. The Commission admitted that "[o]ur prior decisions applying . . . [the Panama Canal] statute have held that its limitation extends to *any* interest in a competing water carrier, not merely to an interest enabling a railroad to exercise control of a water carrier or to influence directly a water carrier's operations." Appendix, p. 57a (emphasis supplied). Moreover, in promulgating the Voting Trust Rules under which the present transaction was allowed to proceed, the Commission made clear that the rules were designed to permit persons "to acquire interests in regulated carriers" without violating Section 11343's separate and more general prohibition on transfers of "control" of regulated carriers without ICC approval. 44 Fed. Reg. 59909 (1979). Nevertheless, without holding any hearing, the Commission determined that a voting trust arrangement "prevents the railroad from influencing water carrier competition" (Appendix, p. 63a), and thus that CSX would acquire "no prohibited interest in a water carrier" under the Panama Canal Act. Appendix, p. 52a.

The Commission thus fashioned its own policy for this case, ignoring the policy determination made by Congress and embodied in the Panama Canal Act that railroads and water carriers be completely divorced unless and until the ICC has made the required statutory determinations after a full hearing. The ICC did not stand neutral and conduct a hearing as the statute required. Rather, the Commission admitted that it was making its own policy: "[I]t is Commission policy to avoid interference in the workings of the marketplace where the law we are to enforce does not require our intervention." Appendix, pp. 51a-52a. As Judge Greene correctly observed, the Commission's newly adopted policy for this case

> is a euphemism for a refusal to enforce the prohibition of the law unless there is no construction, no matter how remote from the congressional purpose,

> which would permit an escape. If the Commission were committed to a neutral policy of enforcing the statute as written and as it was intended to be applied, it would not have felt a need to state the agency policy in these terms. Whatever may be true in other circumstances, the policy underlying *this* statute is *not* to defer to the marketplace where rail and water carriers are involved. The statute directs that railroads shall not—obviously regardless of the marketplace—acquire such carriers unless it has first been determined that such takeovers could not harm competition.

Appendix, p. 47a n.31 (con't). Where Congress has established a presumption or a policy, then an agency must adhere to and enforce that presumption and carry out that policy, and not make one of its own choosing. *Motor Vehicle Manufacturers' Association v. State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856, 2866-67 (1983). And, "a new administration may not choose not to enforce laws of which it does not approve, or to ignore statutory standards in carrying out its regulatory functions." *Id.* at 2875 n.* (Rehnquist, J., dissenting).

Significantly, even the Court of Appeals majority did not attempt to defend the Commission's analysis. It disclaimed the Commission's "broad language" (Appendix, p. 3a), describing it as "inconsistent with our rationale for affirming the ICC's decision." Appendix, p. 10a n.10. The majority instead relied on two prior ICC decisions[16] as "implicitly hold[ing] that a purchase contract contingent on ICC approval is not an 'interest' " prohibited by the Panama Canal Act (Appendix, p. 25a), and on that basis discerned an ambiguity in the statute that simply does not exist. As the majority admitted (Appendix, pp. 22a-23a), the meaning of the statutory term

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[16] Illinois Central Railroad—Control—John I. Hay Co., 317 I.C.C. 39 (1962); Chicago, Milwaukee, St. Paul & Pacific Railroad Control, Bremerton Freight Car Ferry, Inc., 312 I.C.C. 553 (1961).

"interest" simply was not in issue in either of those cases, and the ICC did not even comment on the matter.[17] Nothing in the majority's opinion can support the ICC's impermissible determination to allow CSX's acquisition of the Texas Gas water carriers prior to holding the "full hearing" plainly required by the Panama Canal Act.[18]

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[17] The majority also plainly misinterpreted the effect of the purchase agreement in the *John Hay* case, and thereby concluded that the WTA had made some concession it never in fact made. *See* Appendix, p. 27a. The majority stated that a purchase price adjustment provision of the agreement provided in *John Hay* "obviously gave [the railroad] a substantial stake in John Hay's future profitability and concomitant incentive to steer traffic to John Hay from other water carriers." Appendix, p. 22a. In fact, exactly the opposite was true. The effect of the adjustment clause was to increase the purchase price by the amount of any increase in John Hay's earned surplus between the date of the purchase agreement and the closing date. *See* 317 I.C.C. at 62. Thus, all interim profits accrued to the benefit of the John Hay shareholders, with the result that the railroad had neither an economic interest in John Hay nor an economic incentive to prefer John Hay over other water carriers.

[18] The majority seemed to be influenced by a concern, mentioned repeatedly in its opinion, that there was no clear precedent determining whether ICC approval of a railroad's acquisition of an interest in a water carrier must precede the acquisition. *See* Appendix, pp. 14a-16a, 17a-18a, 20a, 22a-23a. Ultimately, however, the majority "reject[ed] . . . [the] alternative" argument of CSX of overturning the Commission's interpretation that the statute requires "prior approval . . . [of] . . . acquisition[s]. . . ." Appendix, p. 25a n.27. In fact, the ICC previously made clear in *Investigation of Seatrain Lines, Inc., supra*, that the statute requires a *preacquisition* determination whether the rail carrier "do[es] or may compete" with the water carrier in question. 206 I.C.C. at 336-37.

The majority also stated (Appendix, p. 29a), that even if it had agreed with the WTA's interpretation of the Panama Canal Act, it could not have ordered the ICC to seek an injunction barring the CSX tender offer. Whatever the merits of this contention, the fact is that the ICC expressly based its refusal to seek an injunction on its belief that, in view of the voting trust arrangement, CSX would not acquire any prohibited "interest." *See* Appendix, p. 52a. Moreover, had either the Court of Appeals or the ICC declared that

B. The Court of Appeals' Decision Will Substantially Impair the National Transportation Policy and Nullify the Congressional Prohibition of Railroad Acquisitions of Water Carriers

In enacting the Panama Canal Act, Congress recognized the special need for water transport competition as a check on the abuses of railroad power and acted to preserve and protect independent water carriers from railroad intrusion. Congress has never retreated from that determination. In the National Transportation Policy, Congress "declared [it to be part of] . . . the national transportation policy . . . to preserve the inherent advantages of each mode [of transportation]." Pub. L. No. 76-785, § 1, 54 Stat. 899 (1940) (codified as amended at 49 U.S.C. § 10101 (Supp. V 1981)). In the 1980 Staggers Rail Act of 1980, Congress reaffirmed the policy of the United States Government "to ensure effective competition and coordination between rail carriers and other modes [of transportation]" and "to prohibit predatory pricing and practices, [and] to avoid undue concentrations of market power . . . ." Pub. L. No. 96-448, § 101(a), 94 Stat. 1897 (current version at 49 U.S.C. §§ 10101a(5), (13) (Supp. V 1981)). In the same legislation, Congress provided:

> With respect to the relationship between water carriers and rail carriers, none of the amendments made by this Act shall be construed to make lawful (1) any competitive practice that is unfair, destructive, predatory, or otherwise undermines competition and that was unlawful on the effective date of this Act, or (2) any other competitive practice that is unfair, predatory, *or otherwise undermines competition.*

Pub. L. No. 96-448, § 707, 94 Stat. 1965-66 (1980) (emphasis supplied). As stated in the Conference Report,

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completion of CSX's tender offer would have entailed a Panama Canal Act violation, it is highly unlikely that any injunctive action would have been necessary.

"[t]he intent [of this provision] is that none of the amendments made by this Act is to be used to legitimize the undermining of rail-water competition." H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 143, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4110, 4175. In this context, it is highly significant that Congress has never repealed the key statute—the Panama Canal Act—which regulates rail-water carrier relationships.[19]

For more than 70 years, the Panama Canal Act has served as the keystone of a consistent policy of preserving an independent water transportation industry, free of railroad intrusion. In 1908, President Theodore Roosevelt submitted the Preliminary Report of the Inland Waterways Commission to Congress, stating:

> The report shows that commerce was driven from the Mississippi by the railroads. While production was limited, the railways, with their convenient terminals, gave quicker and more satisfactory service than the waterways. Later they prevented the restoration of river traffic by keeping down their rates along the river, recouping themselves by higher charges elsewhere. They also acquired water fronts and terminals to an extent which made water competition impossible. Throughout the country railways have secured control of canals and steamboat lines that today inland waterway transportation is largely in their hands.

Message of the President to Congress, February 26, 1908 (transmitting the Preliminary Report of the Inland Waterways Commission), reproduced in S. Doc. Vol. 17, 60th Cong., 1st Sess. iii-vii (1908).

The Panama Canal Act was passed against the history of fierce competition between railroads and water carriers, in which railroads used every device and means to

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[19] In two instances, bills were introduced to repeal the Panama Canal Act, but each bill failed to elicit Congressional support and died in committee. *See* S. 48, 97th Cong., 2d Sess. (1982); S. 1355, 86th Cong., 1st Sess. (1959).

drive water carrier competitors out of business. The acquisition of bargelines by railroads became an extremely effective way of eliminating competition. The acquired carrier was itself immediately eliminated as a competitor, and it could then be used as a weapon, to drive independents out of the market, and to keep them out. As the ICC found in *Lake Line Applications Under Panama Canal Act*, 33 I.C.C. 699, 716 (1915):

> These boat lines under the control of the . . . railroads have been first a sword and then a shield. When these railroads succeeded in gaining control of the boat lines which had been in competition with paralleling rails in which they were interested, and later effected their combination through the Lake Line Association, by which they were able to and did drive all independent boats from the through lake-and-rail transportation, they thereby destroyed the possibility of competition with their railroads other than such competition as they were of a mind to permit. Having disposed of real competition via the lakes, these boats are now held as a shield against possible competition of new independents. Since it appears from the records that the railroads are able to operate their boat lines at a loss where there is now no competition from independent lines, it is manifest that they could and would operate at a further loss in a rate war against independents. The large financial resources of the owning railroads make it impossible for an independent to engage in a rate war with a boat line so financed.

With railroad rates and practices now largely deregulated[20] and in view of the numerous recent railroad consolidations, the preservation of water carrier competition

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[20] Deregulation of the railroads commenced with the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act"), Pub. L. No. 94-210, 90 Stat. 31 (codified as amended in scattered sections of 15, 45 and 49 U.S.C.), and continued with the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (current version in scattered sections of 49 U.S.C.).

is all the more important today.[21] The Commission's decision in this case nevertheless permitted one of the nation's largest railroads to acquire the nation's largest inland water carrier. As Judge Greene correctly recognized, if this transaction can be permitted to go forward through use of a voting trust mechanism, then every railroad acquisition of a water carrier will be permitted to do so, and the prior hearing requirement of the Panama Canal Act will have been nullified.

In permitting the CSX-Texas Gas stock transaction to proceed, the Commission not only ignored the mandate of the Panama Canal Act, it refused to consider the obvious anti-competitive impact of the transaction, even during the interim of several years which will elapse before completion of Commission and appellate proceedings on CSX's application to dissolve the voting trust and the two years permitted under the voting trust for divestiture. Indeed, the voting trust itself has a ten-year duration. The Commission "expressly refused to consider" whether "the specific independent voting trust agreement at issue [here] was adequate" to preserve competition.[22] At the same time, the Commission admitted that nothing in the voting trust agreement prevents either concerted action by CSX and ACL or unilateral action by either of them detri-

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[21] Since 1980, four giant rail systems have been created by merger. In 1980, Burlington Northern acquired the St. Louis-San Francisco Railroad. That same year, CSX was created by the merger of the Chessie System and the Seaboard Coast Line. In 1982, the Southern and the Norfolk & Western Railroads combined. In 1983, Western Pacific merged into Union Pacific. In October, 1983, the Southern Pacific and Santa Fe announced their contemplated merger. As a result, there are now only three big eastern railroads: the Norfolk Southern, CSX, and Conrail. There soon will only be three big western railroads: the Burlington Northern, Pac. Rail, and the Southern Pacific-Santa Fe.

[22] Brief for Respondent Interstate Commerce Commission, Water Transport Ass'n v. Interstate Commerce Commission, No. 83-1737 (D.C. Cir.), dated August 19, 1983, at 29.

mental to competing carriers and shippers alike. Appendix, p. 63a-64a.[23]

The ICC's treatment of this merger of two giants in the surface transportation industry stands in stark contrast to judicial responses to mergers of other horizontal competitors. In the latter context, the courts have made clear that the danger of interim harm to competition should the transaction be allowed to proceed frequently is so great that only a "full stop" preliminary injunction will adequately preserve competition pending a determination on the merits. *See, e.g., F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc.*, 597 F.2d 814, 818 (2d Cir. 1979); *FTC v. Lancaster Colony Corp.*, 434 F. Supp. 1088, 1097 (S.D.N.Y. 1977); *see also FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1085-86 (D.C. Cir. 1981). Here, the transaction has been permitted to proceed without regard to the statutory hearing requirements, without regard to the competitive harm that may result, and without regard to the National Transportation Policy.

This decision, permitting the second largest railroad to acquire the largest inland water carrier, if not reviewed now by this Court, will necessarily be viewed as judicial authorization of the voting trust device for acquisitions by other railroads of water carriers, all contrary to the Congressional mandate of the Panama Canal Act.[24] Un-

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[23] The majority opinion conceded that the ICC had never before this case considered "whether, as under § 11,343, a railroad can use an independent voting trust to acquire a water carrier before the ICC has had time to conduct a hearing and give or withhold its approval." Appendix, p. 6a. Yet the ICC ruled contrary to the Congressional mandate without even holding a hearing.

[24] With respect to future railroad acquisitions of water carriers, the ICC stated that:

> Depending on the structure of their transaction, the parties might wish to create a temporary voting trust under the Commission's voting trust guidelines to hold the stock of the water carrier pending formal hearings on the acquisition. The Commission has already announced its own view that such trusts

less this Court acts now, the Court of Appeals' decision will establish a precedent that effectively nullifies the Congressional mandate that a railroad cannot acquire an interest in a water carrier prior to the hearing requirements and determinations of the Panama Canal Act. The decision will substantially impair the National Transportation Policy in favor of a strong independent water carrier industry which the Panama Canal Act was designed to protect and maintain.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 2, 1983

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are permissible, under the Panama Canal Act, 49 U.S.C. § 11321. Its interpretation has been endorsed in this Court's decision.

Response of Interstate Commerce Commission to (1) Petition for Reconsideration of Order Denying Petitioners' Suggestion for Rehearing *En Banc* and (2) Motion to Stay Issuance of Mandate. Brief for Respondent Interstate Commerce Commission. Water Transport Ass'n v. Interstate Commerce Commission, No. 83-1737 (D.C. Cir.), dated August 19, 1983, at 4.

APPENDIX

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MAJORITY OPINION—Filed August 4, 1983

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1737

WATER TRANSPORT ASSOCIATION,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

CSX CORPORATION and
TEXAS GAS RESOURCES CORPORATION,
EASTERN COAL TRANSPORTATION CONFERENCE,
Intervenors

Petition for Review of an Order of the
Interstate Commerce Commission

Argued July 20, 1983

Decided August 4, 1983

Richard A. Zeller, with whom *Neil K. Evans*, *Alan M. Wiseman*, *James R. Fox*, and *Robert F. Ruyak* were on the brief, for petitioners.

Ernest Abbott, Attorney, Interstate Commerce Commission, with whom *John Broadley*, General Counsel, and *Ellen D. Hanson*, Associate General Counsel, Interstate Commerce Commission, were on the brief, for respondent,

Interstate Commerce Commission. *Henri F. Rush* and *Edward J. O'Meara*, Attorneys, Interstate Commerce Commission, also entered appearances for respondent, Interstate Commerce Commission.

John J. Powers, III, Attorney, Department of Justice, entered an appearance for respondent, United States of America.

Peter J. Nickles, with whom *Eugene D. Gulland* and *Ellen Bass* were on the brief, for intervenors, CSX Corporation, et al.

William L. Slover, *C. Michael Loftus*, and *Donald G. Avery* were on the brief for intervenor, Eastern Coal Transportation Conference.

Before: WALD and SCALIA, *Circuit Judges*, and HAROLD H. GREENE,* *District Judge* for the District of Columbia.

Opinion for the Court filed by *Circuit Judge* WALD.

Dissenting opinion filed by *District Judge* GREENE.

WALD, *Circuit Judge*: CSX Corp. (which operates a railroad) agreed to acquire by tender offer Texas Gas Resources Corp. (Texas Gas), which in turn owns American Commercial Barge Lines, Inc. (which operates a barge line). Water Transport Association (WTA), an organization of barge operators, asked the Interstate Commerce Commission (ICC or Commission) to declare that the tender offer violates the Panama Canal Act, 49 U.S.C. § 11,321. WTA argued that § 11,321(a)(1) makes it unlawful for a railroad to "own, operate, control, or have an interest in" a competing water carrier unless the Commission has approved the transaction after a full hearing, and that no hearing had been held. The ICC held that the tender offer did not violate the Canal Act because CSX and Texas Gas had agreed to put the barge line stock into an independent voting trust until

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

the ICC held a hearing and approved or disapproved the transaction. WTA appeals the ICC's decision.

We affirm the ICC's decision, though not all of the Commission's broad language. We hold that the ICC, as an incident to its authority under § 11,321 to approve the acquisition after hearing, may authorize CSX to proceed with the tender offer if CSX agrees to hold the barge line in a temporary ICC-approved independent voting trust until a hearing can be held.

I. BACKGROUND

A. *Statutory Scheme*

Two sections of the Interstate Commerce Act restrict a railroad's power to acquire a water carrier. One, 49 U.S.C. § 11,343, deals generally with one carrier acquiring another carrier; the other, *id.* § 11,321, is specifically concerned with a rail carrier acquiring a water carrier.

1. *Provisions Governing Merger of Two Carriers*

49 U.S.C. § 11,343(a) requires advance ICC approval before one carrier can merge with or otherwise acquire control of another carrier:

> The following transactions . . . may be carried out only with the approval and authorization of the Commission:
>
> (1) consolidation or merger . . . of at least 2 carriers into one corporation . . . .
>
> . . . .
>
> (3) acquisition of control of a carrier by any number of carriers.
>
> (4) acquisition of control of at least 2 carriers by a person that is not a carrier.
>
> (5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

The ICC "shall approve" the transaction if it finds the transaction is "consistent with the public interest." *Id.* § 11,344(c). Before giving its approval, the ICC must conduct a full evidentiary hearing, which can take several years for a merger of two large railroads, *see id.* § 11,345(b), and 10 months for other transactions of "regional or national transportation significance," *see id.* § 11,345(c).

Because of this long delay, merging carriers often have an economic incentive to complete the transaction first and seek ICC approval later. The ICC has long permitted carriers to do this by use of an independent voting trust. If the acquiring carriers puts the stock of the acquired carriers in an independent voting trust, the ICC holds that the transaction does not violate § 11,343 because the acquiring carrier does not "control" the acquired carrier. *See* Voting Trust Rules, 49 C.F.R. § 1013 (1982). This construction of § 11,343 has been upheld by the courts [1] and is not disputed here.

2. *The Panama Canal Act*

The second relevant provision of the Interstate Commerce Act, and the principal focus of this case, is 49 U.S.C. § 11,321, which derives from § 11 of the Panama Canal Act of 1912.[2] Congress specifically designed the Canal Act to protect independent water carriers from unfair competition by rail-owned water carriers. As presently codified, it forbids a rail carrier to "own, operate, control, or have an interest in" a competing water carrier unless the ICC finds that the ownership, control, or

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[1] *See* B.F. Goodrich Co. v. Northwest Indus., 303 F. Supp. 53, 58-61 (D. Del. 1969), *aff'd without reaching this issue*, 424 F.2d 1349, 1357 (3d Cir.), *cert. denied*, 400 U.S. 822 (1970); Illinois Cent. R.R. v. United States, 263 F. Supp. 421, 424 (N.D. Ill. 1966) (3-judge court), *aff'd mem.*, 385 U.S. 457 (1967).

[2] Ch. 390, 37 Stat. 560, 566-67 (1912).

interest will not be contrary to the "public interest" and will not reduce water competition:

> (a)(1) Notwithstanding [§ 11,343], a [rail] carrier . . . may not own, operate, control, or have an interest in a water carrier . . . with which it does or may compete for traffic.
>
> . . . .
>
> (b) Notwithstanding subsection (a) of this section, the Commission may authorize a [rail] carrier . . . to own, operate, control, or have an interest in a water common carrier . . . when the Commission finds that ownership, operation, control, or interest will still allow that water common carrier . . . to be operated in the public interest . . . and that it will still allow competition, without reduction, on the water route in question.

Section 11,321(a)(2) gives the Commission authority to determine whether a rail carrier "does or may compete" with a water carrier:

> The Commission may decide . . . questions of fact related to competition or the possibility of competition under this subsection on an application of a carrier. . . . The Commission may begin a proceeding under this subsection on its own initiative or on application of a shipper . . . if the carrier has not applied to the Commission and had the question of competition or the possibility of competition determined . . . .

Any Commission action, whether a finding of fact on competition under subsection (a)(2), or approval of ownership, control, or interest despite the existence of competition under subsection (b), may be taken "only after a full hearing." *Id.* § 11,321(c).

Cases where a rail carrier has sought to acquire a competing water carrier have been few and far between.

As a result, the ICC had no occasion before this case to consider whether, as under § 11,343, a railroad can use an independent voting trust to acquire a water carrier before the ICC has had time to conduct a hearing and give or withhold its approval.[3]

B. *The CSX Tender Offer*

Texas Gas is a public corporation whose primary business is running a natural gas pipeline system. American Commercial Barge Lines, a wholly-owned subsidiary of Texas Gas, is an ICC-regulated water carrier that operates a barge line east of the Mississippi. Its operations represent about 10% of Texas Gas revenues.

On June 6, 1983, Coastal Corp. made a hostile tender offer for 51% of Texas Gas' stock at $45 per share. Texas Gas looked for a "white knight" to make a friendly tender offer at a higher price and on June 9 found CSX Corp., which agreed to purchase 100% of Texas Gas' stock at $52 per share. CSX's primary business is operating a large railroad east of the Mississippi. The railroad is, of course, regulated by the ICC.

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[3] The only cases we are aware of where a rail carrier has sought ICC approval for its plan to acquire a water carrier are Illinois Cent. R.R.—Control—John I. Hay Co., 317 I.C.C. 39 (1962) (parties executed purchase contract contingent on ICC approval under §§ 11,343 and 11,321) and Chicago, Milwaukee, St. Paul & Pac. R.R. Control, Bremerton Freight Car Ferry, Inc., 312 I.C.C. 553 (1961) (same). *Cf.* Investigation of Seatrain Lines, 206 I.C.C. 328 (1935) (railroad acquired minority interest in a newly formed water carrier and requested ICC approval for continued ownership).

See also Ohio Barge Line Control, 250 I.C.C. 56, 61 (1941) (steel company that owned railroad acquired barge line and claimed it did not need to apply for ICC approval under the Canal Act because barge line did not compete with railroad; issue of competition not decided); Warrier & Gulf Navigation Co. Control, 250 I.C.C. 26, 31 (1941) (same); Nicholson Universal S.S. Co. (Interest of N.Y. Cent. R.R.), 248 I.C.C. 43 (1941) (railroad covertly controlled water carrier without seeking ICC approval).

Texas Gas and CSX recognized that the merger of CSX with Texas Gas' barge line subsidiary required ICC approval under 49 U.S.C. § 11,343 (requiring ICC approval before one carrier can acquire another) and might require approval under *id.* § 11,321 (requiring ICC approval for a rail carrier to own a competing water carrier). They therefore agreed to place the barge line stock in an independent voting trust pursuant to ICC voting trust guidelines established under § 11,343. *See* 49 C.F.R. § 1013 (1982).

The voting trust was irrevocable and instructed the trustee, Midlantic National Bank, not to "create any dependence or intercorporate relationship" between CSX and American Commercial Barge Lines, nor to vote the trust stock "to elect any . . . representative of Texas Gas, CSX or their affiliates as an officer or director of the [barge line]."[4] CSX committed to apply to the ICC for authority to control American Commercial Barge Lines "as soon as practicable."[5] CSX hoped that the voting trust would allow the overall CSX-Texas Gas merger to go forward while the ICC was considering whether to approve CSX's application to acquire the barge line subsidiary.

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[4] Voting Trust Agreement between Texas Gas Transmission Corp. and Midlantic Nat'l Bank ¶ 4 (June 13, 1983), *reprinted in* Petitioner's Appendix ("App.") item C, at 3.

Technically, the entity placed in trust was a Texas Gas subsidiary called American Commercial Lines, Inc., which in turn wholly owns American Commercial Barge Lines, Inc. We use the latter name to refer to both subsidiaries.

[5] Letter from Texas Gas and CSX to ICC, June 10, 1983, at 1, App. item B, at 1. At oral argument, counsel for CSX reiterated CSX's commitment to apply promptly for ICC approval of the transaction, and stated that 60 to 90 days would be a reasonable time within which to prepare an application. We expect CSX to apply for ICC approval of its takeover of American Commercial Barge Lines, under both 49 U.S.C. § 11,343 and *id.* § 11,321, within 90 days after CSX acquires Texas Gas' stock.

The ICC staff reviewed the voting trust agreement and requested various changes, including an instruction to the trustee to sell the barge line if the ICC disapproves the merger.[6] After CSX and Texas Gas made the changes, the ICC staff issued its "informal nonbinding Commission opinion" that the trust "does effectively insulate . . . CSX from violation of the Commission's policy against an unauthorized acquisition of *control* of a regulated carrier."[7] The ICC staff opinion did not discuss whether the voting trust also insulated CSX from having an unlawful "interest" in American Commercial Barge Lines under § 11,321.

C. *Proceedings Before the ICC*

On June 23, 1983, WTA petitioned the ICC for a declaration that the voting trust, even if it satisfied § 11,343's command that one carrier not control another without prior ICC approval, did not satisfy § 11,321's requirement that a rail carrier not hold any "interest" in a water carrier without prior ICC approval.[8] The Association also asked the ICC to take appropriate steps to prevent the merger from going forward.[9]

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[6] Voting Trust Agreement, *supra* note 4, ¶ 7(c), App. item C, at 7-8; *see* Letter from Texas Gas to ICC, June 14, 1983, App. item D (describing changes in the trust agreement). Thus, the dissent is mistaken in its assumption that the Commission "made its determination . . . on the basis of an abstract examination of voting trusts in general." The record shows that the Commission staff reviewed and required modifications to this voting trust in particular.

[7] Letter from Louis Gitomer, Deputy Director, ICC Rail Section, to Eugene Gulland, Attorney for Texas Gas, June 20, 1983, App. item E (emphasis added).

[8] Petition of Water Transp. Ass'n for a Declaratory Order Pertaining to Voting Trust Agreement Filed by Texas Gas Resources and CSX Corp., App. item F.

[9] WTA asked the ICC to enjoin the merger of CSX and Texas Gas. Motion of Water Transp. Ass'n for an Order Enjoining CSX

On June 29, the ICC denied WTA's request. The Commission did not address the factual question whether CSX "does or may compete" with American Commercial Barge Lines. Nor did the Commission discuss whether § 11,321 requires a rail carrier to obtain Commission approval *before* acquiring a non-controlling "interest" in a water carrier, as opposed to first acquiring the interest and then seeking Commission approval (§ 11,343 would in any event require advance ICC approval before the rail carrier could *control* the water carrier). Rather, it held that a temporary independent voting trust, designed to insulate a water carrier from control by a rail carrier pending an ICC decision whether the merger may proceed, is not prohibited by § 11,321. *Water Transport Association—Petition for Declaratory Order—American Commercial Lines Voting Trust*, Finance Docket No. 30,215, at 9 (July 1, 1983) [hereinafter cited as *ICC Decision*].

After reviewing the legislative history, the ICC found that the Panama Canal Act was intended "to prohibit [rail-water] relationships with possible adverse impacts on competition." *Id.* at 7. The temporary voting trust was consistent with this purpose because it reasonably insulated the barge line from CSX control, and thus prevented significant harm to water competition during the

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Corp. from Violating the Interstate Commerce Act and Staying its Acquisition of Shares of Stock of Texas Gas Resources Corp., App. item I. The ICC, however, has no power to enjoin anything, and must go to district court to seek an injunction if it decides that injunctive relief is appropriate. *See* 49 U.S.C. § 11,702(a)(3) ("The Interstate Commerce Commission may bring a civil action . . . to enforce an order of the Commission . . . when it is violated by a [rail] carrier . . . ."). We think WTA's technical misstep in asking more than the ICC could give is not significant for purposes of the present case. If the ICC had reached the question of appropriate remedy, it presumably would have understood WTA to petition for appropriate steps to prevent the merger—*i.e.*, an ICC order stating that the merger was unlawful and an attempt to enforce that order in district court.

limited period the trust remained in effect. The Commission explained:

> [A]n independent voting trust of the type entered into here is merely a temporary device designed to avoid a technical violation of the law in the context of a corporate acquisition. It is not, and cannot, be a device for holding stock on a permanent basis. This fact alone largely prevents the voting trust device from becoming a tool for altering rail-water competitive relationships.

Id. at 9.

Moreover, if CSX were to attempt to influence barge operations notwithstanding the trust, the ICC could act at that time; an injunction was not needed to prevent "speculative future violations." *Id.* at 8. Finally, to the extent the statute was ambiguous, policy considerations favored an interpretation that would "avoid interference in the workings of the marketplace." *Id.* at 1.[10]

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[10] We have discussed in text those aspects of the ICC's decision which we find persuasive. Some of the reasoning in the opinion suggests that an independent voting trust is valid under § 11,321 even if not limited to the time period needed to obtain an ICC decision under § 11,321. *See, e.g.*, ICC Decision at 5 ("the holding of an independent voting trust certificate, standing alone, is not the type of interest prohibited by section 11321"); *id.* at 7 ("the test of whether an interest is prohibited by section 11321 is whether the relationship enables the railroad to adversely affect competition from water carriers").

This language is dicta, since CSX had committed to apply promptly for ICC approval. *See* note 5 *supra* and accompanying text. It is also inconsistent with our rationale for affirming the ICC's decision. *See* notes 28-30 *infra* and accompanying text. We uphold the voting trust only as an *interim* device to permit the ICC to hold a hearing and decide whether the two carriers compete and, if so, whether a permanent relationship between the two carriers is in the public interest and will not reduce competition.

D. *Proceedings Before this Court*

Under the securities laws governing tender offers, CSX could begin to purchase tendered Texas Gas shares at midnight, June 29, 1983, the same day that the ICC issued its decision. WTA sought and obtained a temporary restraining order from the district court forbidding CSX to purchase any Texas Gas shares for ten days, to give WTA time to appeal the ICC's decision to this court. A motions panel of this court continued the stay pending our review of the merits.[11] In view of the stay, and the power of Texas Gas shareholders to withdraw their tendered shares from the CSX offer after August 7, we ordered expedited briefing and argument.

E. *Issue Presented*

WTA, supported by intervenor Eastern Coal Transportation Conference (an association of coal producers), raises again the question of statutory construction it raised before the ICC: Can a rail carrier acquire a water carrier prior to the full hearing required by § 11,321 if it places the water carrier stock in a temporary ICC-approved independent voting trust pending the § 11,321 hearing? WTA concedes that the voting trust prevents CSX from *controlling* American Commercial Barge Lines. It argues, however, that CSX still has a financial interest in the barge line that, absent ICC approval after full hearing, is within § 11,321(a)(1)'s ban on a railroad's owning, operating, controlling, *or* having an "interest" in a competing water carrier.[12]

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[11] Order, Water Transp. Ass'n v. CSX Corp. (July 8, 1983) (Judges Wright and MacKinnon; Judge Scalia dissenting).

[12] The Association also argues that even if voting trust ownership is not *per se* a violation, the ICC's voting trust guidelines do not adequately insulate the barge line from control by CSX. This challenge can be quickly dismissed. In developing the voting trust guidelines, the ICC proposed complex and rigorous rules to elimi-

The ICC, supported by intervenors CSX and Texas Gas, argues that it reasonably interpreted an ambiguous statute to comport with modern business conditions. The Commission emphasizes that CSX agreed to acquire Texas Gas under the threat of a hostile tender offer by Coastal Corp., and the acquisition must be completed quickly if at all. For the Commission to hold a full hearing before approving the voting trust would, as a practical matter, kill the deal, thus depriving CSX of its right to a hearing under § 11,321(a)(2) and § 11,321(b) on whether it competes with American Commercial Barge Lines and if so, whether the purchase nevertheless is in the public interest.

The United States Department of Justice, named as a respondent, neither supports nor opposes the ICC's position nor explains its own view of § 11,321.

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nate any possibility of abuse of the trust. It decided instead to adopt weaker guidelines (plus a procedure for informal agency review of trust agreements) so as not to "burden the transportation industry with complex voting trust regulations to combat abuses by a small number of individuals in very limited circumstances." 44 Fed. Reg. 59,909 (1979). The Commission also announced its intent "to monitor closely the continued use of these devices and to take whatever action is necessary, including forced divestiture of stock, in those instances where a voting trust agreement has been improperly used. *Id.* In short, the ICC considered and found acceptable the risk of abuse of a voting trust.

It is not enough, then, for WTA to show that a voting trust that meets the guidelines—as the CSX trust does—would permit an overreaching rail carrier to influence the trust-held water carrier. Rather, WTA must show that the ICC's decision to accept some risk of abuse in return for the benefit of less burdensome regulation was arbitrary and capricious. We do not think it is. The ICC considered the relevant factors, and WTA does not seriously attack the Commission's balancing of the costs of additional regulation against the costs of minimal guidelines.

II. The Validity of a Temporary Independent Voting Trust

A. *History and Purpose of § 11,321*

To determine whether the ICC's construction is consistent with congressional intent, we must review the Panama Canal Act's adoption and its subsequent interpretation by the ICC and amendment by Congress.

1. *The Original Panama Canal Act*

Prior to 1912, the Interstate Commerce Act did not restrict the merger of two carriers, nor did the ICC regulate water carriers. The railroads used this freedom to engage in a variety of schemes to drive competing water carriers out of business. One popular tactic was to buy a water carrier, price its service so low that other water carriers were forced to close down, and then raise prices again.[13]

In 1912, in § 11 of the Panama Canal Act, Congress acted to preserve rail-water competition by barring railroads from owning or controlling competing water carriers:

> [After July 1, 1914], it shall be unlawful for any railroad company . . . to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water . . . with which said railroad . . . does or may compete . . . .

Congress gave the ICC jurisdiction to decide the factual question whether actual or potential competition existed:

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[13] *See* H.R. Rep. No. 423, 62d Cong., 2d Sess. 12 (1912); Lake Line Applications Under Panama Canal Act, 33 I.C.C. 699, 716 (1915).

> Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section . . . or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The commission may on its own motion . . . inquire into the operation of any vessel in use by any railroad . . . which has not applied to the commission and had the question of competition . . . determined as herein provided.

Finally, Congress included a grandfather provision permitting railroads that already owned barge lines to continue to do so if continued ownership was in the public interest and water competition would not be reduced thereby:

> If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water . . . is being operated in the interest of the public and . . . that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July [1, 1914].

There is no firm evidence, either in the statutory text or the legislative history, that Congress focused on the question of *when*—before or after the acquisition—the ICC would determine the existence or absence of competition in the event a rail carrier proposed to buy a water carrier. The second paragraph of the statute (quoted above) contemplates an application with regard to "existing service," which suggests the possibility of acquiring first and applying for ICC approval later. On

the other hand, this language may refer only to service existing at the time the Act was passed. It is likely that Congress gave little thought to new *acquisition* (though it clearly contemplated new *service* by existing carriers); its primary focus was on providing for divestiture where past mergers had reduced competition.[14]

There was also no significant discussion of what the term "interest" might mean. The debate proceeded almost entirely in terms of the pros and cons of railroad "ownership" or "control" of water carriers.[15] It seemed to be agreed that a railroad could own neither all nor part of the stock of a competing water carrier.[16] But

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[14] *See, e.g.*, 48 Cong. Rec. 11,058 (1912) (statement of Sen. Simmons) ("some inconvenience to the rail carriers in divesting themselves of their property in water transportation is to be expected"); *id.* at 11,056 (statement of Sen. Brandegee) (Congress wants rail carriers "to divest themselves of attempting to do any transportation by water"); *id.* at 10,458 (statement of Sen. Smith) (there should be "careful provision made as to the time and manner of enforcing such a provision against companies with established business"); *id.* at 6928 (statement of Rep. Malby) (railroads will be "obliged . . . to dispose of their . . . steamboat lines").

[15] *See, e.g., id.* at 11,217 (statement of Rep. Covington) (Act forbids a railroad "to own, operate, or control in any manner any water carrier with which it may compete"); *id.* at 11,205 (statement of Rep. Sims) (bill "prevents railroad owership of water carriers operated . . . in competition with their rail lines"); *id.* at 11,063 (statement of Sen. Bristow) (bill "forbid[s] railroads from owning such competing steamship lines"); *id.* at 11,058 (statement of Sen. Simmons) ("railroads shall not be permitted to own water carriers in competition with them"); *id.* at 6595 (statement of Rep. Knowland) (bill "prevent[s] any control, directly or indirectly"). *See also* Letter from C.A. Prouty, ICC Chairman, to President Taft (Mar. 12, 1912), *reprinted in* 48 Cong. Rec. 10,463 (1912) ("it is absolutely essential that rail carriers be prohibited from owning or controlling, directly or indirectly, competing water carriers").

[16] *See, e.g.*, 48 Cong. Rec. 6568 (1912) (statement of Rep. Broussard) (Act addresses "whether steamships owned in whole or in part by railroad companies shall be permitted to use the canal"); *id.* at 6595 (interchange between Rep. Hardy and Rep. Knowland) (quoted in note 17 *infra*).

the one attempt in the debate to delineate what other relationships might be permitted ended inconclusively with the sponsor of the railroad provision urging the representative who had pointed out an ambiguity (concerning the same stockholders owning shares in both a railroad and a water carrier) to "give that careful study and correct it if he can." [17]

2. *The Transportation Act of 1920*

In 1920, Congress gave the ICC authority to regulate carrier mergers generally. The Transportation Act of 1920, ch. 91, sec. 407, § 5(2), 41 Stat. 456, 481 (current version at 49 U.S.C. § 11,343), provided that the ICC could approve mergers that "will be in the public interest":

> Whenever the Commission is of opinion, after hearing, upon application of any carrier . . . that the acquisition . . . of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner . . . will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition . . . .

Congress did not change the Panama Canal Act, merely renumbering its three paragraphs as §§ 5(9)-(11) of the revised § 5 of the Interstate Commerce Act.

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[17] *See id.* at 6594-95:

> Mr. HARDY. . . . You prevent a railroad company from owning stock in a water line, but you do not prevent the same stockholders that own stock in a railway company from owning stock in a water line.
>
> Mr. KNOWLAND. We prevent any control, directly or indirectly; and I think that would cover it . . . .
>
> . . . .
>
> Mr. HARDY. Just one moment. I do not think that a railroad company would be owning an interest in a ship line because one of its stockholders owned an interest in a ship line . . . because the railroad does not own what its stockholders own.
>
> Mr. KNOWLAND. I hope the gentleman will give that careful study and correct it if he can.

3. *Early ICC Interpretation of the Panama Canal Act*

The Interstate Commerce Commission, during the 1920s and 1930s, gave the Panama Canal Act a liberal interpretation that the 1912 Congress may not have contemplated. The ICC's interpretation is important because it was endorsed by a later Congress.

In *Southern Pacific Company's Ownership of Atlantic Steamship Lines*, 77 I.C.C. 124 (1923), the ICC found that Southern Pacific's proposed new water service would compete with Southern Pacific's rail lines, *id.* at 137, but nevertheless approved the new service. The Commission construed the Canal Act to permit new service under the same standard that governed continuance of existing service—whether the new service would be in the public interest and would not reduce water competition. *Id.* at 128-29. The Commission explained:

> The purpose of the Panama Canal amendment . . . was not to forbid railroad ownership, operation, or control of steamship lines, but to forbid the use of such ownership or control in such a manner as to restrict movement of interstate commerce . . . .

Id. at 137.

Investigation of Seatrain Lines, Inc., 206 I.C.C. 328 (1935), extended the *Southern Pacific* holding to railroad investment in new water carriers as well as new service by existing rail-owned water carriers. Seatrain, 15% owned by two railroads, was formed in 1932 to carry railcars by boat up and down the Eastern seaboard. At roughly the same time, the railroads applied to the Commission to determine whether their stock holding violated the Panama Canal Act. The Commission found that the railroads' minority ownership of Seatrain fell within the Canal Act's prohibition of "any interest whatsoever" and that the new company competed with the two railroads. *Id.* at 333, 335. Nevertheless, the Commission approved

continued stock ownership by the railroads because Seatrain's service was in the public interest and would not reduce water competition. *Id.* at 335-36. Significantly, the Commission did not suggest that it was improper for the railroads to acquire an interest in a competing water carrier first and ask the Commission's approval later.

4. *The Transportation Act of 1940*

Against this background, Congress in 1940 enacted major amendments to the Interstate Commerce Act.[18] Economic times had changed and the railroads were in poor financial shape and were beset by strong competition from unregulated water carriers. At the railroads' urging, Congress brought water carriers under ICC control with the purpose, among other things, of protecting railroads against unrestrained water carrier competition.[19]

Congress also amended the Panama Canal Act with the specific purpose of endorsing the ICC's interpretation of the Canal Act, in the *Southern Pacific* and *Seatrain Lines* cases, to permit railroad acquisitions of water carriers that were in the public interest and would not reduce competition.[20] The Canal Act (codified at 49 U.S.C. § 5 (14)-(16)) now provided (significant changes italicized):

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[18] Transportation Act of 1940, ch. 722, 54 Stat. 898.

[19] *See* S. Rep. No. 433, 76th Cong., 1st Sess. 1 (1939) ("With one-third of the railroad mileage already in bankruptcy . . . and with another third tottering on the verge of bankruptcy, action must be taken to preserve not only the railroads but an adequate transportation system for this country."); *id.* Part II (Minority Views), at 2 ("Where has the demand for regulation [of water carriers] come from? It comes from the railroads.").

[20] Transportation Act of 1940, *supra* note 18, sec. 7, § 5(14)-(16), 54 Stat. at 909-10; *see* H.R. Rep. No. 2832 (Conf. Rep.), 76th Cong., 3d Sess. 69 (1940):

> The so-called Panama Canal Act provisions . . . have been modified for the purpose of . . . making more certain the authority of the Commission, in connection with which there has

(14) Notwithstanding [the predecessor to § 11,343], from and after [July 1, 1914], it shall be unlawful for any [rail] carrier . . . to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water . . . with which such carrier aforesaid does or may compete . . . .

(15) Jurisdiction is hereby conferred on the Commission to determine questions of fact . . . as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of [§ 5(14)] . . . *or may pray for an order under the provisions of* [*§ 5(16)*]. The Commission may on its own motion . . . inquire into the operation of any vessel in use by any railroad . . . which has not applied to the Commission and had the question of competition . . . determined as herein provided . . . .

(16) *Notwithstanding the provisions of* [*§ 5(14)*], the Commission shall have authority . . . to authorize [a rail] carrier to *own or acquire ownership of, to lease or operate, to have or acquire control of, or to have or acquire an interest in, a common carrier by water* . . . if the Commission shall find that the

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apparently been doubt, with respect to installation of new service.

See also 86 Cong. Rec. 10,175 (1940) (statement of Rep. Lea, House floor manager for the Act) (approving the ICC's reasoning in *Southern Pacific*); *id.* at 11,271 (statement of Sen. Clark) (complaining that Congress was endorsing the ICC's *Seatrain Lines* opinion); *id.* at 11,285 (statement of Sen. Wheeler) ("the decisions of the Interstate Commerce Commission were in exact accord with the intent of Congress").

> continuance *or acquisition . . . will not prevent* such common carrier by water . . . from being operated in the interest of the public . . . and that it will not exclude, prevent, or reduce competition on the route by water under consideration . . . .

Congress clearly expected rail carriers to be able, with ICC approval, to acquire competing water carriers. However, the congressional debate again failed to focus on when—before or after the acquisition took place—the ICC would determine whether competition existed under § 5(15) or if the acquisition was in the public interest under § 5(16). The language of § 5(16) does, however, seem to contemplate both advance inquiry by a railroad that wants to acquire a Commission review of an existing arrangement if the railroad buys first and asks permission later.[21]

If Congress did not consider the timing of the ICC's inquiry, far less did it consider the subtler question whether an advance approval requirement, coupled with § 5(14)'s ban on "any interest whatsoever," would interdict financial arrangements that a rail carrier and a water carrier might want to or need to make pending ICC review of a merger.

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[21] The only indication in the extensive debate over the amendments that a railroad must obtain prior approval is a few scattered comments that suggest that the congressmen who made them may have assumed that a railroad would obtain approval first and acquire a water carrier afterwards. *See* 85 Cong. Rec. 11,612 (1940) (question by Sen. Clark) (inquiring whether the bill "empowers the Interstate Commerce Commission to authorize railroads to acquire [competing water] lines"); *id.* at 11,613 (response by Sen. Reed) (a railroad with a terminal at Duluth could "operate boat lines to Buffalo, if [it] could secure permission for the Interstate Commerce Commission to do so"); *id.* (statement of Sen. Taft) ("under the proposed legislation the Interstate Commerce Commission is given power to authorize a railroad to acquire a competing water service").

Congress has not amended the Panama Canal Act since 1940. The differences between the current version in § 11,321 (quoted in part I.A *supra*) and the 1940 version arise from a 1978 recodification of the Interstate Commerce Act that was intended to be "without substantive change." 49 U.S.C. note preceding § 10,101. Congress has, however, substantially deregulated the railroad industry (notably rate-setting practices) in the Railroad Revitalization Regulatory Reform Act of 1976[22] and the Staggers Rail Act of 1980.[23] The Staggers Act, moreover, establishes "the policy of the United States . . . to minimize the need for Federal regulatory control over the rail transportation system." 49 U.S.C. § 10,101a(2).[24]

B. *ICC Cases Involving Water Carrier Acquisitions*

Only five reported ICC decisions in the 43 years since the 1940 revision of the Panama Canal Act involve railroad acquisition of a water carrier. Of these, only two are directly relevant. Both involved purchase contracts

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[22] Pub. L. No. 94-210, 90 Stat. 31 (1976) (current version in scattered sections of 45, 49 U.S.C.).

[23] Pub. L. No. 96-448, 94 Stat. 1895 (1980) (amending 49 U.S.C. §§ 10,101-11,917).

[24] Congress also provided in the Staggers Act, somewhat obliquely:

> With respect to the relationship between water carriers and rail carriers, none of the amendments made by this Act shall be construed to make lawful . . . any competitive practice that is unfair, destructive, predatory, or otherwise undermines competition . . . .

Id. § 707, 94 Stat. at 1965-66 (codified at 49 U.S.C. § 10,706 note). This provision was apparently designed to alleviate concern that the railroads might use their new rate-setting freedom to set predatory rates that would drive water carriers out of business. *See* H.R. Rep. No. 1430 (Conf. Rep.), 96th Cong., 2d Sess. 143 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4110, 4175:

> The intent is that none of the amendments made by this Act is to be used to legitimize the undermining of rail-water

contingent on ICC approval. In *Illinois Central Railroad —Control—John I. Hay Co.*, 317 I.C.C. 39 (1962), Illinois Central agreed to purchase John Hay for $9,000,000 plus earnings from date of agreement to date of closing, less any dividends paid. *Id.* at 62 (hearing examiner's report). John Hay promised to continue its business without substantial change until closing, agreed not to enter into contracts with other carriers unless required to do so by law, and agreed to various other conditions. *Id.* at 63. This binding purchase contract obviously gave Illinois Central a substantial stake in John Hay's future profitability and concomitant incentive to steer traffic to John Hay from competing water carriers. It also gave Illinois Central the power, through enforcing the provisions of the contract, to restrict John Hay's freedom to engage in the full range of corporate activities. Nevertheless, no one suggested that Illinois Central, by signing the purchase contract, had illegally acquired an "interest" in the barge line within the meaning of § 5(14)'s prohibition on "any interest whatsoever." The Commission considered on the merits and disapproved the proposed takeover. *Id.* at 53-54.

Similarly, in *Chicago, Milwaukee, St. Paul & Pacific Railroad Control, Bremerton Freight Car Ferry, Inc.*, 312 I.C.C. 553 (1961), Bremerton Ferry agreed to sell its business for $105,000, to incur no obligations except in the usual course of business until closing, and to maintain its physical properties in substantially as good condition as they were in at time of agreement. *Id.* at 556. Once again, no one questioned whether the railroad had

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competition. Railroad rates and practices that . . . are unfair, destructive, predatory, or otherwise undermine competition . . . shall continue to be prohibited.

The conferees rejected a broader House provision that "none of the amendments made by this Act shall be construed to modify . . . existing law with respect to competition and coordination [between rail carriers and water carriers]." H.R. 7235, § 803, *reprinted in* H.R. Rep. No. 1035, 96th Cong., 2d Sess. 33 (1980).

acquired a forbidden "interest" in the water carrier. This time, the ICC approved the transaction on the grounds that the two carriers did not compete. *Id.* at 557.[25]

C. *Is This Voting Trust an "Interest"?*

1. *Standard of Review*

We preface our analysis by noting the limited scope of our review. As a general rule, courts must give "great

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[25] In two of the other three cases, Ohio Barge Line Control, 250 I.C.C. 57 (1941), and Warrior & Gulf Navigation Co. Control, 250 I.C.C. 26 (1941), a steel company that already owned a railroad acquired a barge line and applied for ICC approval under the predecessor to § 11,343 (governing carrier mergers generally). In both cases the steel company claimed that the railroad and the barge line did not compete and did not apply either for ICC approval of the acquisition under § 5(16) or even for an ICC determination under § 5(15) whether the railroad and barge line competed. The ICC, without suggesting that the failure to apply was improper, declined to pass on whether the railroad and the barge line competed. *See* 250 I.C.C. at 61; 250 I.C.C. at 31.

In the fifth case, Nicholson Universal S.S. Co. Ownership (Interest of N.Y. Cent. R.R.), 248 I.C.C. 43 (1941), the Commission, after investigation on its own motion, found that the New York Central Railroad for some time had covertly controlled Nicholson Steamship Co. through a web of director interlocks and a non-independent voting trust. The Commission ordered divestiture. *Id.* at 66.

With regard to the import of the language from ICC opinions quoted by the dissent, we would point out that in the only case involving a voting trust, Nicholson Universal S.S. Co. Ownership (Interest of N.Y. Cent. R.R.), 248 I.C.C. 43 (1941), the majority did *not* hold that a permanent voting trust was *per se* a forbidden "interest." Instead, it found that the New York Central's permanent trust conferred an "interest" only after concluding that the trust conferred the power to control. *See id.* at 63-64. This narrow analysis was no accident, for Chairman Eastman expressed his separate view that the existence of control was "not of prime importance" because the voting trust necessarily conferred an "interest" in the water carrier. *Id.* at 68 (Eastman, Chmn., concurring).

deference to the interpretation given the statute by the officers or agency charged with its administration." *EPA* v. *National Crushed Stone Association*, 449 U.S. 64, 83 (1980) (citation and footnote omitted); *see National Wildlife Federation* v. *Gorsuch*, 693 F.2d 156, 166-67 (D.C. Cir. 1982).[26] Of course, if the ICC's interpretation is "inconsistent with the language of the [Canal Act], as interpreted in light of the legislative history, or if it 'frustrate[s] the policy that Congress sought to implement,' no amount of deference can save it." *National Wildlife Federation*, 693 F.2d at 171 (quoting *Federal Election Commission* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981)). However, we should not lightly assume that the plain language of the statute forecloses the Commission's interpretation, for, in Learned Hand's words, "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary, but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell* v. *Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945) (quoted in *Watt* v. *Alaska*, 451 U.S. 259, 266 n.9 (1981)).

If the statutory language and legislative purpose permit the agency's construction, that construction "must

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[26] The ICC decision in this case bears appropriate indicia warranting judicial deference. The ICC, which Congress has given exclusive jurisdiction to approve or disapprove carrier mergers, *see* 49 U.S.C. § 11,341(a), is "precisely the type of agency to which deference should presumptively be afforded." Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981). Moreover, the ICC has fully explained its reasons, has reached a result consistent with its past decisions, *see* ICC Decision at 4-5 (distinguishing prior cases as involving either control or a permanent interest) and has relied on policy considerations rather than "narrow dissection of the language of the Act." National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 169 (D.C. Cir. 1982).

be upheld if it is 'sufficiently reasonable,' even if it is not 'the only reasonable one or even the reading the court would have reached' on its own." *National Wildlife Federation*, 693 F.2d at 171 (quoting *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. at 39).

2. *The Short Step From Purchase Contract to Voting Trust*

The *John Hay* and *Bremerton Ferry* cases can be taken to implicitly hold that a purchase contract contingent on ICC approval is not an "interest" in a water carrier within the meaning of the Canal Act. Moreover, the ICC could not reasonably have held otherwise. A railroad and a water carrier are unlikely to embark on the long and costly process of seeking ICC approval without a definitive merger agreement. Such an agreement, however, necessarily gives the acquiring railroad a stake in the future earning power of its prospective partner. One could reasonably call this stake, even though it is contingent on ICC approval, an "interest" in the water carrier. *See Black's Law Dictionary* 729 (5th ed. 1979) ("*Interest.* The most general term that can be employed to denote a right, claim, title, or legal share in something."). Nevertheless, such a right or claim must be permissible because Congress contemplated that railroads could acquire water carriers.

Thus, unless, contrary to the Commission's interpretation, the statute does not require advance approval of acquisitions,[27] we are forced to conclude that the statutory phrase "any interest whatsoever" cannot be taken literally.[28] Moreover, the legislative history is of scant

[27] We reject this alternative. The ICC's actions in the present case reflect its view that prior approval is needed for this acquisition, and we find that interpretation a reasonable one in light of the statutory language and history.

[28] *John Hay* and *Bremerton Ferry* can also be taken to implicitly hold that a purchase contract, even if it is an "interest" within the

help in deciding which interests are permitted and which forbidden. Congress expressly considered neither the scope of the term "interest" nor the tension between a literal reading of the term and the express authorization in § 11,321(b) for rail-water mergers.

To decide which interests are permitted, we must refer to the basic Canal Act policy to preserve rail-water competition and thus consider the ability and incentive of the

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meaning of the Canal Act, is one that can be acquired pending ICC approval of a more substantial interest. The argument that a railroad can acquire a minimal interest without prior ICC approval is in some ways more attractive than the argument that the phrase "any interest whatsoever"—which sounds absolute—cannot be read that way. It is consistent with Commission precedent, for the Commission has never objected to a party's failure to seek advance approval despite several opportunities to do so. *See* Ohio Barge Line Control, 250 I.C.C. 57 (1941); Warrior & Gulf Navigation Co. Control, 250 I.C.C. 26 (1941) (both discussed in note 25 *supra*); Investigation of Seatrain Lines, 206 I.C.C. 328 (1935) (discussed in subsection A.3 *supra*). Moreover, it would do little violence to the statutory scheme. Advance approval would still be required for a controlling interest, under § 11,343 as well as § 11,321, and there seems scant anticompetitive danger from a noncontrolling interest held only for the interim period needed to seek ICC approval.

ICC counsel and CSX both argue that this interpretation of the Canal Act provides an alternate ground for sustaining the Commission's decision. ICC Brief at 10 n.1; CSX Brief at 25-29. We need not decide that question here, for the ICC chose to rely on a nonliteral interpretation of the term "interest," and we are able to uphold that interpretation. We are, however, surprised that the dissent, while rejecting the Commission's construction that some "interests" may exist while approval is sought, nonetheless readily accepts the proposition that prior approval is required in all cases. *See* dissenting op. at 13. For, were we to accept the dissent's literal interpretation of the "interest" prohibition, the necessity of giving meaning and effect to the permission provision (which cannot, as discussed in text, realistically be implemented without prior acquisition of some "interest") would seem to require rejection of a prior approval interpretation. The result, of course, would be the same under either formula; WTA's claim for relief must be denied.

railroad to influence the water carrier or water competition and the ability and incentive of the water carrier to compete with the rail carrier.

If it be conceded—and WTA concedes it—that a purchase contract contingent upon ICC approval of the underlying transaction is not an "interest" within the meaning of § 11,321(a)(1),[29] it is but a short step to hold that the temporary ICC-approved independent voting trust used by CSX is not an "interest" either.[30] The purchase contracts in *John Hay* and *Bremerton Ferry* and the voting trust in the present case share two critical features. Both are strictly limited in time duration and both insulate the water carrier from railroad control pending a full ICC hearing.

Either way the rail carrier has some incentive to influence the water carrier's operations because the rail carrier may reap the benefit of the water carrier's future profitability. But in both cases, the incentive is diluted because the ICC may disapprove the transaction, thus

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[29] *See* WTA Brief at 47 (*John Hay* case "demonstrates how the statute should work").

[30] WTA concentrates its statutory argument exclusively on the term "interest" in the statutory phrase "own, operate, control, or have an interest in." Intervenor Eastern Coal Traffic Conference raises the alternate possibility that the voting trust is proscribed because CSX will continue to "own" (in an equitable sense) American Commercial Barge Lines. Eastern Coal Traffic Conference Brief at 5.

We think the term "own," like the term "interest," cannot be an absolute. One who holds a contract to purchase (as in *John Hay* and *Bremerton Ferry*) is often called an "equitable" owner, yet, to make the statute work, purchase contracts must be permissible. Ultimately, the precise content of both terms must be assessed on the basis of the purpose they are meant to serve. The critical analytical point is that there must be *some* minimal leeway in § 11,321(a)(1)'s proscription of ownership or interest, or else the merger authority in § 11,321(b) becomes a dead letter.

eliminating any anticipated future profits.[31] In addition, the potential for influence is limited by the short duration of the purchase contract or voting trust. Moreover, the rail carrier lacks the control over the water carrier needed to embark on major anticompetitive actions such as predatory pricing.[32]

As for the water carrier, it may lack an incentive to compete vigorously with its potential future master. But again, this possible lack of incentive would exist no matter how the deal is structured. Moreover, the water carrier has greater ability to compete with full managerial authority vested in an independent trustee than with management's hands tied by a restrictive purchase contract. *Cf. Lamoille Valley Railroad* v. *ICC*, No. 82-1498,

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[31] It is necessary to this argument that the voting trust continue for only a short period of time. This condition is satisfied in this case because CSX committed to apply promptly for ICC review of its contemplated merger with American Commercial Barge Lines and the voting trust—at ICC insistence—provides for divestiture should the ICC disapprove the merger. Thus, CSX has only a short-term stake in the barge line's future profits.

WTA and the dissent attempt to distinguish a voting trust from a purchase contract on the basis that in the latter, the water carrier retains the benefit of earnings in the interim period while the ICC is deciding whether to approve the merger. WTA Reply Brief at 22-23; dissenting op. at 9-10. This is only partly correct; if the purchase price is fixed at date of agreement, with no adjustment for earnings between date of agreement and date of closing (*Bremerton Ferry* involved such an agreement), the rail carrier receives the benefit of interim earnings unless the ICC disapproves the transaction. Moreover, so long as the interim period is short, the railroad's extra stake in interim earnings should not substantially increase its financial stake in or incentive to influence the water carrier's operations.

[32] In the case of a voting trust, the railroad actually owns the water carrier's stock; thus, it is important that the voting trust ensure the water carrier's independence. As discussed in note 12 *supra*, we think the ICC's voting trust guidelines (including advance ICC review of the trust agreement), the temporary nature of the voting trust, and ICC authority to remedy any attempted abuse of the trust, suffice in this regard.

slip op. at 71 (D.C. Cir. June 28, 1983) (finding it a close question whether a purchase contract gave one railroad premature control over another railroad).

Moreover, the ICC's interpretation is consistent with the dual purpose of the Canal Act to permit some rail-water mergers while preserving vigorous water competition and with the congressional policy, stated in the Staggers Act, "to minimize the need for Federal regulatory control over the rail transportation system." 49 U.S.C. § 10,101(a)(2). An ICC ruling that a voting trust violates the Canal Act would foreclose the common acquisition device of the tender offer. This would force railroads to use less desirable alternative means if they could, and foreclose acquisition entirely if it could not be made by purchase contract (a likely consequence in this case because of the competing tender offer from Coastal Corp.). In addition, such a ruling might, as in this case, disrupt a much larger merger of which the water carrier acquisition is only a small part. The Canal Act purpose to permit the ICC to approve rail-water mergers that are in the public interest would be frustrated, at minimal gain in preventing anticompetitive railroad practices.

D. *The ICC's Enforcement Discretion*

Even if the present voting trust violated the Panama Canal Act, we would be unable to award WTA the relief which it seeks. The dissent is doubtless correct when it states, *see* dissenting op. at 17 n.33, that the Commission has no discretion not to enforce the Panama Canal Act prohibition—and cases such as *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973), adequately support that proposition. The present case, however, is two steps short of that situation. First, the Commission is not saying that it will not enforce the prohibition against all violations, or even against all violations involving a voting trust, but only against *this particular voting trust.* No

case we are aware of supports the unlikely proposition that an agency must proceed against every single violator —and indeed *Moog Industries* v. *FTC*, 355 U.S. 411 (1958), holds precisely the contrary.

Second, in denying WTA's petition (and still assuming that the present voting trust is a violation) the Commission would not *even* be saying that it declines to enforce the Act's prohibition against this particular violation— but only that it declines to enforce it *through the particular means* that WTA seeks, namely, the extreme remedy of an injunction. The Commission could have explored other remedies, such as a daily fine for violation or an order to sell the barge line or spin it off to shareholders either promptly after completing the tender offer or after a full hearing. The Commission's choice among these options would presumably depend largely on its assessment of the likelihood that it would permit the merger after full hearing (either because the two carriers do not compete or because the merger is in the public interest) and of the injury to competition in the interim. The Commission's weighing of these factors and its consequent exercise of its enforcement discretion, if reviewable at all,[33] would be reviewable only under the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). We do not see how, in the application of such a test, the dissent can conclude that the Commission had no choice except to select the remedy of injunction. That is especially so since one of the central considerations governing that choice, "the adverse effect on competition that might result from [a particular enforcement strategy]" is "clearly within the

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[33] *See* Southern Ry. v. Seaboard Allied Milling Corp., 442 U.S. 444, 452-63 (1979) (ICC decision not to investigate lawfulness of seasonal rate increase is not reviewable); City of Chicago v. United States, 396 U.S. 162, 165-66 (1969) (although ICC decision not to investigate railroad's abandonment of passenger service would have been unreviewable, its written decision after investigation was subject to APA review).

special competence of" and "call[s] for the discretionary determination by" the agency. *Moog Industries* v. *FTC*, *supra*, 355 U.S. at 413.

Even assuming, then, the correctness of the dissent's position on the meaning of the statute, the outcome would not be what the dissent proposes, an order requiring the Commission to seek injunctive relief; but at most a remand for the somewhat quixotic purpose of enabling the Commission to decide whether it wishes to seek that extreme remedy against an arrangement which it has found to be essentially harmless.

III. Conclusion

In sum, we think, in the circumstances of this case, that the ICC has given its governing statute a reasonable interpretation. We *affirm* the ICC's decision that the Panama Canal Act, 49 U.S.C. § 11,321, permits a rail carrier to acquire water carrier stock without prior hearing if it puts the stock into an ICC-approved independent voting trust for the minimum period needed to secure a full hearing on whether the Canal Act permits the stock ownership.[34]

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[34] WTA charges that CSX will acquire, in addition to the voting trust, two other "interests" in American Commercial Barge Lines: interlocking directors and a $20 million debt now owed by the barge line to Texas Gas.

Texas Gas promised to eliminate the director interlocks before CSX acquires any Texas Gas stock and the Commission apparently accepted the promise, for it did not discuss the interlocks in its opinion. We have no basis for doubting this promise; moreover, the voting trust agreement would seem to instruct the trustee to eliminate any interlocks. *See* text accompanying note 4 *supra*. Finally, the Commission has ample power to remedy any abuse of the trust, including possibly disapproving the prospective merger.

As for the $20 million loan, CSX states in its brief that it has been repaid. CSX Brief at 38 n.1. In view of WTA's failure to bring the loan agreement to the ICC's attention at the time called

We lift the stay effective 24 hours from the date of this decision; the mandate will issue at the usual time.

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for under ICC practice, *see* ICC Decision at 3, and of the substantial probability of mootness, we decline to decide whether, as the ICC stated, a bona fide debtor-creditor relationship is permitted by the Canal Act.

DISSENTING OPINION—Filed August 4, 1983

GREENE, *District Judge*, dissenting: The Panama Canal Act provides that a rail carrier "may not . . . have an interest in a water common carrier . . . with which it does or may compete for traffic." 49 U.S.C. § 11321(a)(1). A railroad may escape that prohibition only if the Interstate Commerce Commission finds that such interest as the carrier intends to acquire "will still allow competition, without reduction, on the water route in question."[1] 49 U.S.C. § 11321(b). However, even so, "[t]he Commission may take action under this section only after a full hearing." 49 U.S.C. § 11321(c).

CSX Corporation, the third largest railroad in the United States,[2] seeks to acquire Texas Gas Resources Corporation, one of whose fully-owned subsidiaries is American Commercial Lines, Inc. (ACL) which operates American Commercial Barge Lines, Inc. (ACBL), the largest water carrier engaged in operations on the inland waterway system of the United States. This, then, is by any measure a massive takeover of a water carrier by a railroad. Since the merger required ICC approval, CSX and Texas Gas established a voting trust arrangement whereby CSX would own the acquired shares of ACL but a bank trustee would exercise voting power. The ICC ruled that, in view of the establishment of the voting trust, CSX was not acquiring an "interest" within the

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[1] 49 U.S.C. § 11321(b). The ICC must also find that, notwithstanding the interest, the water common carrier will be operated in the public interest.

[2] CSX is the parent company of several railroads, including the Chessie System Railroads and the Seaboard System Railroads. CSX is also the nation's largest rail carrier of coal. It operates from the Great Lakes to the Gulf of Mexico, and from the Mississippi River to the Atlantic Ocean.

meaning of the statutory prohibition, and it permitted the acquisition to go forward. The Court affirms the Commission decision, albeit on a different rationale. I dissent.

I.

There is a long history in this country of attempts by railroads to acquire surface freight transport domination by attempting to drive water carriers out of business. Water transportation being the cheaper mode, rail carriers typically sought to overcome their economic disadvantage by buying water carriers, lowering prices to levels at which competing water carriers were forced out of business, and then raising the prices charged by the remaining water carriers, so as to eliminate any differential between water and rail rates.[3] The Panama Canal Act is aimed directly at these aggressive actions.[4]

The flat prohibition[5] on railroad takeovers in section 11321 is an expression of this congressional concern. The

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[3] *See* American Waterways Operators, Inc. v. United States, 386 F. Supp. 799, 803 (D.D.C. 1974); Lake Line Applications Under Panama Canal Act, 33 I.C.C. 699, 712-14 (1915). The House report on the Panama Canal Act states:

> The evil is prevalent, recognized, and complained of. The proper function of a railroad corporation is to operate trains on its tracks, not to occupy the waters with ships in mock competition with itself, which in reality operate to the extinction of all genuine competition.

H.R. Rep. No. 423, 62nd Cong., 2d Sess. 12 (1912).

[4] This is not an ancient law, ill suited to modern conditions. Congress reaffirmed its purpose a number of times, the last time as late as 1980. See section 7 of Public Law No. 96-448, 94 Stat. 1895, 1965-66 (1980); H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 142-43 (1980), reprinted in 1980 U.S. Code Cong. & Adm. News 4110, 4175.

[5] Prior to the 1978 codification of the Act (Pub. L. No. 95-473, 92 Stat. 1342 (1978)), the statute prohibited a railroad from having "any interest whatsoever" in a water carrier. The codification substituted the present wording which, according to the historical and revision note to section 11321, is even more inclusive than the prior language.

escape provision codified in subsection (b) was added in 1940 to provide relief where it could be demonstrated that competition would not be harmed and that the joint rail-water operation would be in the public interest. Transportation Act of 1940, Pub. L. No. 76-785, 54 Stat. 898, 909-10. However, as noted, Congress also specified that such a determination was to be made only after a hearing.

The Commission's construction of the statute in this case stands this fairly straightforward statutory scheme on its head. Instead of making its determination regarding the appropriateness of the acquisition within the framework of the prior hearing required by subsection (c),[6] the ICC transfers the decision-making process to subsection (a) by the simple device of determining at the very outset of its consideration that a voting trust is not an "interest" within the meaning of the Act. The hearing required by the statute is thus postponed until the time the railroad moves for approval of the acquisition itself and for dissolution of the voting trust. As for the issue of competition, the procedure adopted by the Commission drains the Act's prohibition of whatever meaning may be left in the wake of its method of dealing with the term "interest."[7]

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[6] I do not understand the Court to hold that the statute does not require a prior hearing. Although that issue is discussed, the majority does not appear to reach a definitive conclusion. Maj. Op. at 13, 16-19. In any event, I see no substantial basis, either in the history of the statute or its purpose, for concluding that, contrary to the plain words of the Act, a prior hearing is not required. See also Maj. Op. at 19 note 21.

[7] The Commission believes that the Panama Canal Act would not have been violated even if CSX did acquire a prohibited interest in ACBL, on the theory (1) that a finding of actual or possible competition between the two carriers is a prerequisite to a finding of a violation, but (2) that no such finding can be made until a hearing is held. Notwithstanding this reasoning, the Commission refused to hold a hearing. ICC Brief at 10 note 1.

The Commission's error here was particularly egregious because it made its determination that "CSX has no prohibited interest in a water carrier" [8] on the basis of an abstract examination of voting trusts in general. Although implicity recognizing that, depending upon the facts, a voting trust could be so structured that it would be a prohibited "interest" within the meaning of the statute, the Commission expressly refused to examine [9] whether the requisite facts existed here.[10] The Commission also recognized that, in addition to ownership by CSX of the voting trust certificate, relationships might exist between CSX and ACBL which could constitute a prohibited "interest," but, again, it declined either to examine into the nature of any such relationships or to make findings with respect thereto. ICC Decision at 8-9.[11]

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[8] *See* Water Transport Association—Petition for Declaratory Order—American Commercial Lines Voting Trust, Finance Docket No. 30,215 at 9 (July 1, 1983) [hereinafter ICC Decision].

[9] In its brief in this Court, the Commission states:

> WTA challenges the Commission's alleged 'finding' that the specific independent voting trust agreement at issue was adequate. The Commission expressly refused, however, to rule on the adequacy of that agreement.

Brief of Respondent Interstate Commerce Commission at 29. *See also* ICC Decision at 9.

[10] Had it done so, it might have found, *inter alia*, that the voting trust agreement includes only the ICC-regulated subsidiaries of Texas Gas, excluding unregulated water carriers owned by that corporation; that it does not restrict personal contact and other interaction between CSX and the water carrier affiliates of Texas Gas; and that it does not prohibit unilateral anticompetitive conduct stemming from the awareness of CSX and Texas Gas employees of their relationship. See Petitioner's Brief at 42-46. Since the Commission declined to hold a hearing, and since only five days elapsed between the filing of the WTA petition and the agency decision, neither the accuracy of these charges nor their exhaustiveness is known.

[11] The ICC also declined to place in the record WTA's allegation that CSX and ACL would be able to file consolidated tax returns

In short, when the Commission refused to interfere with the merger on the ground that CSX "has no prohibited interest" in ACBL (ICC Decision at 1), it did not know—and it does not now know—whether CSX has, in fact, acquired such an interest. All it relied on was its assumption that a typical or average voting trust is not the kind of interest prohibited by section 11321. As indicated in Part II *infra*, that conclusion, too, was incorrect. But even if the ICC was right regarding voting trusts in the abstract, it could not justifiably hold that the acquisition by CSX of this particular voting trust certificate—the one that the petitioner complains about and the one that is before this Court—does not violate the statute. Whatever deference is ordinarily due to decisions of regulatory agencies (Maj. Op. at 22), it does not, it seems to me, extend to so irrational a determination.[12]

II

This basic procedural irregularity is sufficient, in my judgment, to require a reversal of the Commission's decision. However, the Commission also erred substantively in finding that the voting trust would not give CSX an "interest" in ACBL.[13]

Unlike 49 U.S.C. § 11343, the general provision applicable to carrier acquisitions which prohibits only the unauthorized acquisition of control or management powers [14]

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on the ground that this allegation was raised in a pleading which the Commission regarded as an improper "reply to a reply." ICC Decision at 3-4.

[12] *See* National Association of Recycling Industries v. ICC, 704 F.2d 638, 639 (D.C. Cir. 1983).

[13] As I read the opinion of the majority of this Court, it refrains from endorsing the Commission's position in this regard. See p. 12 *infra*. The Department of Justice, named as a respondent, neither supports nor opposes the ICC position.

[14] "Control" is defined as "actual control, legal control, and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (B) any other means. 49 U.S.C. § 10102(7).

over other common carriers, the Panama Canal Act provides that

> [n]otwithstanding section 11343 . . . a [rail] carrier . . . may not own, operate, control, *or have an interest in* a water common carrier . . . with which it does or may compete for traffic.

The Commission regards the addition of the term "interest" as having so little significance that it treats "interest" and "control" as essentially interchangeable, and the term "interest" for practical purposes as mere surplusage. Thus, in its decision, the Commission stated that

> the provisions of section 11321 are [not] sufficiently different from those of section 11343, so that voting trusts, and the body of law developed around voting trusts, cannot operate in the same manner under the two provisions.

ICC Decision at 8-9. In its brief, the agency similarly dismisses the fact of the inclusion by the Congress of the term "interest" in the Panama Canal Act as being nothing more than "slightly different words." Brief of ICC at 19 note 4.

The Commission did not take so cavalier a view of the statutory pattern in the past. In *Investigation of Seatrain Lines, Inc.*, 206 I.C.C. 328, 333 (1935), it flatly stated that a rail carrier is forbidden to have "*any* interest [in a water carrier] and the prohibition is absolute" (emphasis in original), and it rejected as too narrow a construction of "interest" "as meaning [only] such an interest as enables a railroad to control or exercise direct influence over the activities and policies of the water carrier." 206 I.C.C. at 333. The Commission's present construction is directly to the contrary. ICC Decision at 4. Likewise, in the *Nicholson Universal Steamship Company Ownership*, 248 I.C.C. 43, 64 (1941), the Commission observed that a railroad need not obtain control of a water carrier to acquire a prohibited interest. With re-

spect more specifically to a voting trust, the Commission implicitly held that such an arrangement was "not sufficient to avoid a violation" of the "interest" clause (28 I.C.C. at 63-66), and it further emphasized that the Panama Canal Act "was meant to bring about a complete divorcement of any railroad interest in [water carriers]." [15]

Joseph Eastman, the then chairman of the Commission, placed the issue in its proper perspective, when he stated in a concurrence in *Nicholson*, 248 I.C.C. at 67-68:

> [T]his provision [section 11321(a)] prohibits, not only 'control,' but also 'any interest whatsoever,' and . . . both are clarified by the parenthetical clause containing such broad words as 'or otherwise,' indirectly, and 'in any other manner.' [See note 5 *supra*]. . . . I well remember the passage of the Panama Canal Act, and entertain no doubt that the prohibition . . . was motivated by a desire to enforce a complete *separation* between railroads and competing water carriers. Practical experience . . . had shown the legal difficulties attendant upon proof of 'control' of one company by another. . . . Because of these difficulties, I think it is plain that the authors of this prohibition intended to, and did, use language so broad and comprehensive that all such obstacles to the enforcement of the complete separation which they desired would be overcome. The

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[15] 248 I.C.C. at 64-65. The Commission attempts to distinguish these precedents on the basis that "they did not present the issue of whether a valid independent voting trust, *standing alone*, would constitute a prohibited interest under those Acts" (emphasis added). ICC Brief at 21. One of the principal problems with the Commission's decision in this case, of course, is that it has refused to consider whether or not the CSX voting trust stands alone. See pp. 4-6 *supra*. Beyond that, the Commission explains away the adverse language in prior decisions on the basis that all of it constitutes mere *dicta*.

> words 'any interest whatsoever' are far from being . . . mere surplusage. . . . They embrace interests which do not necessarily carry with them 'control.' [16]

The Commission, and the majority here, rely to the contrary on *Illinois Central Railroad Co.-Control-John I. Hay Co.*, 317 I.C.C. 39 (1962) and on *Chicago, Milwaukee, St. Paul & Pacific Railroad Co. Control, Bremerton Freight Car Ferry, Inc.*, 312 I.C.C. 553 (1961).

In both of these cases the Commission held hearings on proposed acquisitions, ultimately disapproving the rail-water acquisition in *Illinois Central* and approving it in *Chicago, Milwaukee*. The proposed transactions had been placed before the I.C.C. through purchase contracts the execution of which had been made subject to I.C.C. approval. In neither case was the purchase contract itself challenged as an interest, and the I.C.C. did not address this question. Beyond that, the important point with respect to these cases is that a hearing occurred in both cases *before* the rail carrier acquired the stock of the water carrier. There is no language in either decision, moreover, comparable to that employed by the ICC here, to overrule the *Nicholson-Seatrain* principle that the "interest" language in section 11321 is broader than the "control" language in section 11343.

In short, the Commission's evident view—that "interest" means little more than "control" [17]—is simply wrong.[18]

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[16] *See also*, 48 Cong. Rec. 6928, 9232, 10458, 11055 (1912).

[17] That view is evidenced not only by the above-quoted language from the ICC's decision and its brief, and by its failure to identify a single matter with respect to which application of the "interest" statute would lead to a different result, but also by its reflexive application to this case of voting trust guidelines adopted for "control" situations.

[18] Words employed in a statute cannot be presumed to be surplusage. *See e.g.*, Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 406 (D.C. Cir. 1976). That principle is especially valid where, as here,

The Court considers that a purchase contract is not an "interest" within the meaning of the statute, and that for that reason it is likely that a voting trust is in the same category. Maj. Op. at 23-27.[19] The majority's premise does not seem to me to be as firmly established as it evidently assumes. As indicated above, in the two prior cases in which purchase contracts have been used, the issue was not contested, briefed, or decided. Additionally, under the language of the *Nicholson* or *Seatrain* decisions *supra*, purchase contracts are prohibited interests.[20]

But even if it be assumed, *arguendo*, that a purchase contract between a rail and a water carrier is a permissible device, the result would be no different. A voting trust is not like a purchase contract. In addition to the many formalistic differences, there is the basic fact that under a purchase contract profits flow to the seller, while in a voting trust situation they inure to the benefit of the purchaser. Substantial consequences follow from this factor.[21] Additionally, executory contracts are far less stable and more easily voided or breached than voting trusts, and significant consequences may be expected to flow from

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a statute operating with another law in the area of similar, but not identical subject matter uses additional, different, and stronger terminology.

[19] Both the Commission and the Court acknowledge that there is no precedent upholding a voting trust in the section 11321 situation.

[20] In an effort at persuasion, petitioner WTA concedes in its brief that a purchase contract "made sense [in the *John I. Hay* case] and it could make sense here." Brief at 24. We are, of course, not bound by that observation.

[21] The incentive to manipulate is certainly greater in the latter situation than in the former. It is also noteworthy that the Securities Laws include a voting trust certificate within the meaning of "security," but they say nothing about purchase contracts. 15 U.S.C. § 78c(2)(10). *See also*, Reserve Life Ins. Co. v. Provident Life Ins. Co., 499 F.2d 715, 724-25 (8th Cir. 1974).

that difference, too, including an increase in the likelihood that the injuries listed in note 24 *infra* will occur.[22]

Finally, even if the majority is correct in its twin conclusions that a purchase contract is not an impermissible interest under the statute and that the step between such a contract and a voting trust is not large, the question at issue in this case remains unanswered. The majority compares a purchase contract with a voting trust; it does not compare a purchase contract with *this* voting trust; nor does it compare a purchase contract with this voting trust *plus* whatever other relationships may exist between CSX and Texas Gas or ACBL. It does not make these comparisons because it cannot, the ICC having explicitly refused to consider anything other than the concept of a voting trust in the abstract.

For these reasons, I would conclude that the Commission erred in endorsing the voting trust arrangement between CSX and ACL as satisfying the Panama Canal Act.

III

The Court does not affirm the Commission's decision that the voting trust is not a prohibited interest but upholds the voting trust arrangement on the basis that it is only an "interim device." Maj. Op. at 9 note 10. In so doing, the Court appears to be holding that the present arrangement between CSX and Texas Gas is acceptable only, or primarily, because (1) at some time in the future there will be an opportunity for the ICC to examine the transaction (Maj. Op. at 28), and (2) to do otherwise would make it difficult, if not impossible, as a matter of the market realities, for railroads to acquire water carriers. Maj. Op. at 27.

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[22] For example, improper collaboration between the employees of the two companies is much more likely if they know that, to all intents and purposes, the transaction is unbreakable. It is also quite improbable that CSX and ACBL will vigorously compete with each other while they are tied together by a voting trust.

There are several problems with the interim arrangement-future hearing rationale.

First. Although CSX committed itself at oral argument to apply for dissolution of the voting trust and approval of the transaction within 90 days, ICC proceedings typically take a long time to bring to a conclusion. See Maj. Op. at 2. Thus, for months, if not years,[23] ACBL will be operated under an "interim" voting trust arrangement even though, by the Court's own reasoning, a voting trust not limited in time would constitute a prohibited interest.

Second. The Panama Canal Act directs that the Commission's hearing and its action on the transaction occur before consummation of the transaction, not many months later. Again, if a voting trust is or may be an "interest" within the meaning of the Act, then under the statute it could not be created as a tool for the acquisition of a water carrier by a railroad in advance of ICC consideration. This is not a mere technical defect. A railroad acquiring an interest in a water carrier has the incentive and ability to inflict significant injury during the interim period.[24]

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[23] By its terms, the voting trust here involved can last for as long as ten years.

[24] Among the possible injuries to competition and competitors are improper collaboration between CSX and barge line employees to the detriment of other water carriers, preferential treatment in rates and service to the rail-owned water carrier at points where water carriers connect with CSX rail lines, and juggling of the barge line's rates to the disadvantage of its competitors. One would have to close one's eyes to the realities to suppose that the water carrier, operating under a voting trust established by CSX, will vigorously compete with CSX. Further, whatever the theoretical retention by the ICC of the power of eventual disapproval, it is unlikely that an acquisition, once having taken place under these circumstances, or having been in operation for many months or many years, will ever be undone. Counsel for the Commission was unable at oral argument to cite an instance where this had occurred.

Third. Ownership of the voting trust will never be the subject of the "full hearing" the Congress intended. The Commission has declined to hold a hearing on this subject now, and the hearing it will presumably hold eventually will concern only the dissolution of the voting trust and its replacement by CSX's permanent acquisition of ACL—not the validity of the voting trust.

Fourth. On the Court's rationale, one could conceivably justify an interim departure from the strict statutory standard if the danger to competition were extremely remote. That is hardly the case here. Interim approval of the CSX takeover in this regard may be analogized to the kind of relief that courts sometimes grant in the preliminary injunction context. One of the factors to be considered in that connection is the likelihood of success on the merits.

The Panama Canal Act forbids an acquisition where the railroad "does or *may* compete." Petitioner WTA supplied the Court with maps which indicate that on a large number of routes in the Midwest CSX and ACBL provide directly parallel service (*e.g.*, St. Louis to Cairo, New Orleans to Tallahassee, Memphis to Louisville). It also appears that coal is the most important commodity carried by CSX and ACBL alike. These facts, to be sure, do not conclusively prove that the merger of the companies will damage competition—no such determination can be made in view of the ICC's refusal to consider the competition issue at this juncture (see note 7 *supra*)—but they do suggest that the likelihood of a finding of no injury to competition is exceedingly small. See *Union Mechling Corp.* v. *United States*, 566 F.2d 722, 729 (D.C. Cir. 1977) (Opinion of Robinson, J.) (rail and water carriers compete if they service two or more points in common unless the prospect of competition is "clearly chimerical"). It makes little sense to allow CSX to acquire this water carrier on an interim basis if there is a substantial likelihood that this acquisition must subsequently

be undone. See *Gulf & Western Industries, Inc.* v. *Great A&P Tea Co.*, 476 F.2d 687, 692-93 (2d Cir. 1973).[25]

Fifth. It may confidently be expected that if, by means of the establishment of a voting trust, this very large merger is allowed to take place without a prior hearing, the same procedure will successfully be used in every future corporate takeover of a water carrier by a railroad. Thus, under the procedure sanctioned by the Court, all hearings (if any) will be future hearings, and the statutory requirement for a hearing in advance of Commission action will become a dead letter.[26]

For these reasons, I cannot agree with the Court's conclusion that the requirement of a prior hearing established by section 11321(c) may safely be disregarded on the theory that a hearing will be held eventually.

The majority's second, and more basic rationale is that in the world of corporate takeovers tender offers must be consummated within a matter of days or they will lapse and that the prior hearing requirement should be dispensed with in light of that reality.

Mechanisms for acquisition other than tender offers do exist. For example, it appears that CSX negotiated with Texas Gas for almost an entire year before the tender offer was made, and it should have been possible for the parties during that period to arrive at a mechanism, such as an ICC approval in principle,[27] for the acquisition of

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[25] This will surely happen unless the ICC should at that time again apply its own policy rather than the congressional view of the proper relationships in the rail-water market. See note 31 *infra*.

[26] Indeed, it may be expected that the decision in this case, since it removes obstacles which some might have thought to exist, will substantially increase railroad interest in water carrier takeovers.

[27] It is suggested that it is the Commission's practice not to grant such approvals. However, not only is it not clear that this is the Commission's practice, but it would seem that, if there is to

control of the water carrier which does not violate the statute.[28] Even if no such mechanism could have been found, the alternative of an acquisition of Texas Gas by CSX without the ten percent interest represented by the ACBL affiliate would have been available.

To be sure, these alternatives may be less efficient than acquisitions by means of tender offers. It does not follow, however, that the transaction should be allowed to proceed. Under the statute, the Commission has little discretion. It is not under an obligation merely to "consider" the public interest, as in the Tunney Act,[29] before acquiescing in a water carrier acquisition by a railroad, nor is it charged merely with the duty of evaluating the transaction under the broad Clayton Act standard whether the merger would have the effect of "substantially lessen[ing] competition."[30] Unlike these more general, flexible laws, the Panama Canal Act flatly prohibits acquisitions of water carriers by railroads, and it allows an exception only in carefully limited circumstances.

The majority speculates that, unless the ICC decision is upheld,[31] it "would force railroads to use less desirable

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be any accommodation to what are called the practical realities, it is more appropriate that the Commission's procedures be adjusted rather than the requirements of the statute.

[28] Mergers and acquisitions were not unknown before the tender offer mechanism gained currency in recent years.

[29] 15 U.S.C. § 16(e).

[30] 15 U.S.C. § 18.

[31] The majority relies heavily on the ICC's interpretation of the statute. That interpretation is entitled to deference, of course, although less so where clear statutory language is involved and where the agency, by its own admission, has never before considered whether a voting trust is an "interest" within the meaning of § 11321.

Furthermore, the agency has informed the Court that its policy is not to interfere with "the workings of the marketplace" where the law does not "require" its intervention nor "compel[] [it] to

alternative means if they could, and foreclose acquisition entirely if it could not be made by purchase contract. . . ." Maj. Op. at 19. That is by no means certain (see pp. 15-16 *supra*). What seems to me to be far more certain is that if the third largest railroad is permitted to acquire the largest inland water carrier without a prior hearing, there will never be an acquisition preceded by a hearing; the escape clause will have swallowed up the basic prohibition; and the Panama Canal Act's careful structure will have been eviscerated.

In the end, a choice may have to be made among the various objectives that may be imputed to the Congress. The majority is concerned about the practical difficulties railroads may encounter in acquiring water carriers if "interest" is given its natural meaning and if a hearing is required in advance, and it suggests that this might complicate achievement of the legislative objective of allowing some takeovers. Maj. Op. at 24, 27. But plainly the dominant congressional purpose is embodied in the prohibition against the acquisition of a water carrier by a competing rail carrier. It seems to me that, if in the process of statutory construction one purpose or the other

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step in." ICC Decision at 1. It is not inappropriate, I think, to observe that this language is a euphemism for a refusal to enforce the prohibition of the law unless there is no construction, no matter how remote from the congressional purpose, which would permit an escape. If the Commission were committed to a neutral policy of enforcing the statute as written and as it was intended to be applied, it would not have felt a need to state the agency policy in these terms. Whatever may be true in other circumstances, the policy underlying *this* statute is *not* to defer to the marketplace where rail and water carriers are involved. The statute directs that railroads shall not—obviously regardless of the workings of the marketplace—acquire such carriers, unless it has first been determined that such take-overs could not harm competition.

Given that the ICC's interpretation and its policy are at variance with the statutory language and purpose, I would not give it the deference accorded by the majority.

must be given preference, the general prohibition should be preferred over the limited escape clause.[32]

The public interest will not be injured if railroads are encouraged to attempt to devise alternative mechanisms to acquire water carriers, even if these mechanisms may be more cumbersome or time-consuming than the tender offers which have found so much favor in recent years. When Congress enacted the Panama Canal Act it seems to have faced with equanimity the possibility that some, or many, attempted rail-water acquisitions would not be consummated. It has not been demonstrated that the take-over of water carriers by railroads is so vital an objective that exceptional efforts should be made so to interpret the governing statute as to allow the take-overs to occur without the prior inquiry and the prior findings which the statute mandates.[33]

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[32] The general prohibition should certainly prevail over the objective of accommodating the desire of this railroad to acquire this water carrier by the most efficient means available.

[33] The majority suggests that the Commission might have prosecutorial discretion not to enforce the Panama Canal Act prohibition as requested by petitioner. Maj. Op. at 29 note 33. It is difficult to believe that, in view of the unequivocal statutory prohibition, and the exclusive jurisdiction of the ICC with respect to rail and water carriers (49 U.S.C. § 5(11)), *see* B. F. Goodrich Co. v. Northwest Industries, Inc., 424 F.2d 1349, 1355 (3rd Cir. 1970), such discretion exists. *See* Adams v. Richardson, 480 F.2d 1159, 1151-53 (D.C. Cir. 1973). However, even if the Act were interpreted as less than a mandatory enforcement statute, this Court could still find, and in my judgment should find, that the ICC's decision to avoid the mandate of the law in this instance constituted a "patent abuse of discretion." Moog Industries v. FTC, 355 U.S. 411, 414 (1958); 2 K. Davis, Administrative Law 229-39 (2d ed. 1979). *See also* Dunlop v. Bachowski, 421 U.S. 560 (1975); Medical Committee for Human Rights v. SEC, 432 F.2d 659, 673 (D.C. Cir. 1972) ("the decisions of this court have never allowed the phrase 'prosecutorial discretion' to be treated as a magical incantation which automatically provides a shield for arbitrariness"). For these reasons, I would remand the case to the Commission with instructions to issue an order stating that the merger is unlawful and, if CSX

The statute prohibits a railroad from acquiring an interest in a water carrier; by any ordinary understanding of that term, a voting trust is an "interest"; yet the Commission has determined that it is not;[34] and the majority of this Court has held that, even if it is, the relationship may be consummated on an interim basis. The statute, by any ordinary understanding of its language, prescribes that before the Commission may allow a railroad to acquire an interest in a water carrier it must hold a hearing; it is clear that Congress meant the hearing to precede the decision; yet the Commission has not held a hearing; and the majority of the Court has decided that a prior hearing is not necessary. The statute explicitly prescribes that a railroad may not acquire a water carrier with which it "does or may" compete for traffic; coal is the most important commodity carried by both companies and they serve the same areas of the country; yet the Commission has permitted the current transaction to pro-

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refused to comply, to seek enforcement of the order in the district court.

In any event, the Commission refused to file an enforcement action, not on discretionary grounds but on its reading of the statute. ICC Decision at 3. If that reading is in error, as I think it is, the appropriate remedy would not be to assume that the agency might have refused enforcement as a matter of discretion or that it would have chosen a remedy, such as a fine, inadequate to this $1 billion transaction, but to remand the case to the Commission for its own decision in that regard.

[34] See Chairman Eastman's concurrence in Nicholson, *supra*, 248 I.C.C. at 68, where he stated in regard to an independent voting trust:

> If, in these circumstances, the New York Central does not have 'any interest whatsoever' in Nicholson Universal, then the law has greater power to deprive language of its plain meaning to a layman than I believe it has, even if there be left out of consideration the parenthetical clause . . . by which the authors of the prohibition obviously intended to forestall all legal quibbles.

See note 5 *supra*.

ceed without even making inquiry into the competition question, evidently on the assumption that, notwithstanding a strong likelihood of an adverse effect on competition, it will ultimately allow the merger; and the majority of the Court permits the Commission to proceed in its course.[35] I believe that the explanations provided for these deviations from what appear to be perfectly sensible and straightforward congressional directions are not persuasive, and accordingly, I respectfully dissent.

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[35] The Court quotes Judge Learned Hand's warning against undue reliance on dictionary definitions. Maj. Op. at 23. In this case, the plain words of the statute are, as I have stated, fully supported by the purpose of the Act and its history. Moreover, when, as here, the statutory language is being construed by the agency in so many respects to mean something other than what the words appear plainly to convey, one must wonder both as to the correctness of the interpretation and the basis for the error. The Commission appears to have been led by its zeal for avoiding an interference with "the workings of the marketplace" (ICC Decision at 1) to wrench the language of the law out of its natural shape. *See* note 31 *supra*. I do not believe that the principle of deference to administrative construction compels us to acquiesce in the Commission's interpretations.

ICC DECISION—Filed June 29, 1983

EC Service Date July 1, 1983

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 30215

WATER TRANSPORT ASSOCIATION—PETITION FOR DECLARATORY ORDER—AMERICAN COMMERCIAL LINES VOTING TRUST

Decided: June 29, 1983

Beneficial ownership by a railroad of a water carrier's stock, held in a valid independent voting trust, does not constitute an interest in a water carrier prohibited by 49 U.S.C. 11321. Petition for declaratory order denied.

Richard A. Zellner and *Mark E. Staib* for petitioner.

Peter J. Nickles, Eugene Gulland, John W. Snow, and *Mark G. Aron* for applicants.

DECISION

BY THE COMMISSION:

By petition filed June 23, 1983, Water Transport Association (WTA) seeks a declaratory order regarding the proposed acquisition of Texas Gas Resources Corporation (Texas Gas) by CSX Corporation (CSX). CSX and Texas Gas have filed a joint reply.

WTA's petition raises two major issues, one of policy and the other of law. Generally, it is Commission policy to avoid interference in the workings of the marketplace where the law we are to enforce does not require our

intervention. *See* Ex Parte No. 332, *Voting Trust Rules* (not printed), served October 16, 1979 and *Reliance Group Holdings—Petition—Declaratory Order*, 366 I.C.C. 446 (1982).

The legal question we must address is whether 49 U.S.C. 11321 compels us to step in and interfere with the marketplace. Based upon our analysis of the facts, we answer no. As the term "interest" is used in 49 U.S.C. 11321, CSX has no prohibited interest in a water carrier. Accordingly, WTA's petition will be denied.

BACKGROUND

CSX, a non-carrier holding company, was organized to be the surviving corporation in the merger of Chessie System, Inc., and Seaboard Coastline Industries, Inc., *CSX—Control—Chessie and Seaboard C.L.I.*, 363 I.C.C. 518, 528 (1980). It owns and operates one of the nation's largest railroad systems and has various non-carrier subsidiaries.

Texas Gas, a natural resources company, conducts regulated water carrier operations through certain wholly-owned subsidiaries. Texas Gas owns all outstanding stock in Texas Gas Transmission Company (TGT). TGT solely owns American Commercial Lines, Inc. (ACL), which in turn wholly owns American Commercial Barge Lines, Inc. (ACBL), a certificated water common and contract carrier.

On June 9, 1983, CSX commenced a tender offer for Texas Gas stock as part of an overall Agreement and Plan of Merger between CSX and Texas Gas.[1]

Because of statutorily-mandated restrictions on a railroad's acquisition of control of, or an interest in, a regu-

[1] Previously, on June 6, 1983, Coastal Corporation had commenced a tender offer for Texas Gas Stock which it subsequently withdrew.

lated water carrier, except by authorization of this Commission (49 U.S.C. 11343 and 11321), TGT, CSX, and Midlantic National Bank of Newark, NJ, as voting trustee, entered into an independent voting trust agreement with respect to ACL's stock. The agreement was submitted to this Commission on June 10, 1983. After consultation with the Commission's staff pursuant to the informal procedures established by our Voting Trust Guidelines, 49 C.F.R. Part 1013, the agreement was modified slightly and resubmitted on June 14, 1983.

POSITIONS OF THE PARTIES

WTA. In its petition, WTA argues that CSX's proposed acquisition of Texas Gas and its water carrier subsidiaries would violate 49 U.S.C. 11321(a)(1)[2] and that the voting trust for ACL stock is insufficient to cure the illegality. It asserts that an independent voting trust entered into in compliance with our Voting Trust Guidelines merely prevents a carrier from acquiring unauthorized *control* of another carrier in violation of 49 U.S.C. 11343. WTA contends that CSX's position with respect to the voting trust certificate, however, is an "interest" in a water carrier prohibited by 49 U.S.C. 11321. It states that this Commission has never held that use of a voting trust is sufficient to avoid a violation of section 11321. Further, it argues that our only reported decision involving use of a voting trust found

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[2] This section provides that: "Notwithstanding sections 11343 and 11344 of this title, a carrier or a person controlling, controlled by, or under common control with a rail, express, sleeping car, or pipeline carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may not own, operate, control, or have an interest in a water common carrier or vessel carrying property or passengers on a water route with which it does or may compete for traffic." The Commission may, however, authorize interests prohibited by subsection (a)(1) in certain circumstances, as specified in 49 U.S.C. 11321(b).

the use of the trust to be insufficient to avoid violation of section 11321, citing *Nicholson Universal S.S. Co. Ownership*, 248 I.C.C. 43 (1941). Therefore, WTA requests that we issue a declaratory order finding that the voting trust is insufficient to avoid unlawful acquisition of an interest in a water carrier by CSX in the event CSX acquires an interest in Texas Gas.

WTA contends also that the financial interest in ACL proposed to be acquired by CSX would enable CSX to influence water carrier competition and CSX will have a financial incentive to quote more favorable rail rates for connections with ACBL than with other barge lines. Further, WTA asserts that section 11321 applies to unregulated as well as to regulated water carriers, but that the voting trust agreement does not extend to unregulated water carrier operations by Texas Gas or its subsidiaries.

CSX and Texas Gas. CSX and Texas Gas assert that this Commission can only make a finding regarding a violation of section 11321 after a full hearing to determine the facts. They argue that WTA's petition is an attempt to secure a determination regarding an alleged violation before any hearing. Further, they contend that an independent voting trust is legally sufficient to avoid any violation of section 11321. Replicants state that *Nicholson Universal* is not controlling in this proceeding because that case was decided on the basis of the involved railroad's ability to exercise control over, or to influence, the water carrier outside the operation of the voting trust. They further argue that the *dicta* in *Nicholson Universal* regarding voting trusts is consistent with a determination that an independent voting trust does not violate section 11321 where there are no other relationships between a railroad and water carrier. Further, they contend that there is no basis for considering hypothetical future violations at this time.

Therefore, they request that WTA's petition for a declaratory order be dismissed. They also seek an interim

determination that the voting trust agreement satisfies the requirements of 49 U.S.C. 11343 and 11321.

PRELIMINARY MATTERS

In addition to the petition for declaratory order, WTA has tendered two other pleadings: (1) a motion for an order enjoining CSX from violating the Interstate Commerce Act by acquiring any shares of Texas Gas and (2) a response to the reply of CSX and Texas Gas to WTA's declaratory order petition.

Inasmuch as we are concluding that the proposed acquisition of Texas Gas stock by CSX, subject to the holding of ACL stock in an independent voting trust, is not unlawful (so long as no other relationship exists that would create an interest in a water carrier), there is no basis for an enforcement action. Accordingly, WTA's motion for an enjoining order will be denied.

WTA's response to CSX and Texas Gas is a reply to a reply and, therefore, is barred. WTA, in its response to CSX and Texas Gas, attempts to characterize the CSX-Texas Gas pleading as an initial statement in order to avoid the prohibition in the Commission's Rules of Practice against a reply to a reply. 49 C.F.R. 1104.13(c). The CSX-Texas Gas pleading, however, is a reply to WTA's petition. To the extent that WTA's reply consists of legal argument in rebuttal to CSX-Texas Gas, that pleading is clearly a barred reply to a reply and is rejected.

WTA, in its reply, also alleges two new facts. WTA asserts that it has discovered (1) an indebtedness in the amount of $20,000,000 by ACBL to Texas Gas and (2) that Texas Gas and ACBL have been filing consolidated Federal income tax returns. It asserts that these facts demonstrate interests in ACBL held by Texas Gas, irrespective of the voting trust, that CSX would acquire.

The offering of these new matters of fact could be construed as a proposed amendment to the petition for declaratory order and not a reply to CSX-Texas Gas. The acceptance of amendments to pleadings is a matter within our discretion. *See* 49 C.F.R. 1104.11. We conclude that leave to amend should not be granted. First, the offered allegations of fact are not new matters. WTA states that the ACBL-Texas Gas debt was disclosed by a report dated December 31, 1982, and that the consolidated returns have been filed for a number of years. Therefore, this information was available to WTA when it filed its petition. Second, WTA has not shown that these allegations are material.

We do not agree with WTA's allegation that a mere creditor-debtor relationship is a prohibited interest under 49 U.S.C. 11321. Our decision in *Nicholson Universal*, cited by WTA, concluded that the creditor-debtor relationship therein did not appear to be *bona fide* and, therefore, indicated that the lender exercised actual control over the borrower. WTA has not alleged any facts demonstrating that the creditor-debtor relationship is not *bona fide*.

We also do not agree with WTA's allegation that the past filing of consolidated tax returns shows that CSX would acquire any interest in ACBL. First, WTA has not alleged that Texas Gas retains the type of beneficial ownership of ACL stock since creating the independent voting trust that would permit the filing of consolidated tax returns with ACL and its subsidiaries. Second, we are not convinced that the tax benefits from the filing of consolidated returns, even if allowed, would create a relationship enabling CSX to affect rail-water competition. As discussed below, we conclude that the ability to affect such competition is a material element of an interest in a water carrier which is prohibited by 49 U.S.C. 11321.

Therefore, WTA's motion will be denied and its reply will be rejected.

DISCUSSION AND CONCLUSIONS

Under the proposed transaction, so long as the trust remains in effect, CSX clearly would not own, operate, or control ACL or ACBL. Rather, it would acquire indirect control of the holder of an independent voting trust certificate relating to all the capital stock of a regulated water carrier. Therefore, the issue presented by the petition is whether CSX would, under these circumstances, acquire control of an "interest" in a water carrier, prohibited by section 11321. We conclude that it would not and, therefore, we will not institute a declaratory order proceeding.

This Commission has never decided whether the acquisition, either directly or indirectly, of an independent voting trust certificate, standing alone, constitutes acquisition of an interest prohibited by section 11321. Our prior decisions applying that statute have held that its limitation extends to any interest in a competing water carrier, not merely to an interest enabling a railroad to exercise control of a water carrier or to influence directly a water carrier's operations. *See Investigation of Seatrain Lines, Inc.*, 206 I.C.C. 328, 333 (1935). Those decisions, however, do not specify at what point a financial or other relationship between a railroad and a water carrier becomes a prohibited interest in a water carrier. In all cases where a prohibited interest has been found to exist, a cooperative relationship between the carriers or a dependence of the water carrier on the railroad was present.

The decision in *Nicholson Universal* was based squarely on the finding that regardless of the voting trust, interlocking corporate relationships remained. Thus, the railroad was able to continue to exercise control of the water carrier irrespective of the voting trust arrangement.

The *dicta* in *Nicholson* indicates that a railroad need not obtain control of a water carrier in order to acquire a prohibited interest. However, *Nicholson* does not go so far as to state that a relationship arising solely from an independent voting trust, without more, would be a prohibited interest.[3]

In *Seatrain*, this Commission found that minority stock ownership, which was insufficient to enable the involved railroads to control or to directly influence a water carrier, did constitute an interest in the water carrier in violation of section 11321. However, the facts in that proceeding showed that the railroad's relationship with the water carrier exceeded the mere holding of non-controlling minority interest in the capital stock. The railroads were represented on the water carrier's board of directors. Further, Seatrain's operations were dependent upon the involved railroads. The *Seatrain* decision makes no holding whether mere ownership of a minority stock interest, without board representation or an operating relationship, would constitute a prohibited interest. Further, acquisition of an independent voting trust certificate is a far more attenuated relationship than is the holding of a minority stock interest. Particularly where the corporation's by-laws provide for the cumulative voting of shares, a minority shareholder may be able to elect some directors, thereby obtaining at least a possible measure of influence over the management of the corporation. The owner of even a small percentage of the stock in a corporation might be able to hold the balance of power between competing minority factions or organize a proxy contest. Where stock is held by an independent voting trust, on the other hand, the trustee

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[3] With respect to this point, the distinction between an independent voting trust designed to prevent any exercise of control or influence and a voting trust of the type often used in earlier years to effect common control by pooled interests must be recognized.

must vote the stock in the best interests of the corporation and in a manner not giving rise to any relationship between the corporation and the beneficial owner of the stock. Further, an independent voting trust is a device used on a temporary basis in connection with a tender offer. It is not, and cannot, be a permanent arrangement for stock ownership.

Finally, the *dicta* in *Seatrain* that any interest in a competing water carrier is prohibited, was narrowed substantially by *Illinois Central Co.—Control—John I. Hay Co.*, 317 I.C.C. 39 (1962). In that case the Commission analyzed its prior decisions, including *Nicholson*, and correctly concluded that:

> . . . the mere interest of a rail carrier, or the fact that some competition exists between the rail and water carrier, particularly where the water carrier routes are, in effect, an extension of the rail lines, do not, in and of themselves, warrant a denial of an application by a rail carrier to acquire control of a competing water carrier. Also, a conclusion that some reduction in competition might result would not necessarily justify an adverse finding. It would depend on the effect of a denial. The important considerations are whether the proposed acquisition would prevent the water carrier in the future from being operated in the advantage of, and for the convenience of the people, and whether such control by the rail carrier would prevent, exclude, or reduce competition on the water routes involved.

317 I.C.C. at 52.

We conclude that the holding of an independent voting trust certificate, standing alone, is not the type of interest prohibited by section 11321. This conclusion also is supported by the legislative history of the statute.

Section 11321 was originally enacted as section 11 of the Panama Canal Act, Pub. L. No. 62-337, 37 Stat. 560,

566 (1912). Section 11 of that Act arose from a Congressional intent to bar railroad-owned ships from using the Panama Canal and undermining water carrier competition with transcontinental railroads. This legislation was of particular interest to representatives of western States. In the course of Congressional hearings on the proposed legislation, section 11 was broadened to include a general limitation on railroad ownership of competing water carriers. Because Congress recognized the potential for railroads to restrain competition without acquiring direct ownership or control of water carriers, section 11 restricted the acquisition of any interest. The legislative history of section 11, however, makes clear that the concern of Congress was with interests potentially having an adverse effect on competition. The nature of this concern is set forth in the House Report accompanying the bill (H.R. 21969) that became the Panama Canal Act.

> The apprehension of railroad-owned vessels driving competition from the canal may or may not be exaggerated, but it is certain that the evil, which is only anticipated there, already exists in the coastwise trade on both coasts, as well as on our lakes and rivers. The evil is prevalent, recognized, and complained of. The proper function of a railroad corporation is to operate trains on its tracks, not to occupy the waters with ships in mock competition with itself, which in reality operate to the extinction of all genuine competition. In answering demands for the exclusion of railroad-owned ships from the canal, which in this bill or any other would simply amount to an amendment of the act to regulate commerce, the committee thinks it wise, just and opportune to broaden the amendment so as to serve the higher, wider, more pressing, and more necessary purpose of excluding the railroads from operating vessels in competition with their tracks anywhere in the coastwise trade generally or in [sic] the lake

[sic] and rivers. H.R. Rep. No. 423, 62d Cong., 2d Sess. 12 (1912).

The debates over section 11 in the House and Senate also clearly demonstrate that Congress had in mind relationships potentially adversely affecting rail-water competition in enacting the restrictions against acquisition of any interest in a water carrier. Representative Adamson, the sponsor of H.R. 21969, explained the purpose of section 11 as follows:

> No railroad has any right to run a ship line to the exclusion of real competition through the watercourses that ought to be competitive with itself. . . . I have no objection to their running ships where, as the gentleman says, they are feeders, to gather up and distribute business. That is all right. But when they propose to get possession of that watercourse that runs parallel to the railroad and take the business and raise the rates by excluding other ships prevents that and kills competition, and that course of action will be prevented some time, if it is not done in this bill.
>
> 48 *Cong. Rec.* 6591 (1912)

Similarly, Congressman Knowland commented:

> The hour is at hand for the announcement of a definite policy on the part of the Government of the United States relating to the control of competing water lines by railroads.
>
> 48 *Cong. Rec.* 6595 (1912)

The record is devoid of comments by supporters of section 11 indicating that the provision was intended to restrict any financial or other relationship between a railroad and a water carrier, regardless of how attenuated and regardless of potential impact on competition. Conversely, the debate indicates that remote relationships, such as ownership by an individual of non-controlling

interests both in a railroad and in a water carrier, would not be prohibited. The only interpretation of the section flatly prohibiting any relationship whatsoever was advanced by Congressman Malby, a leading opponent of section 11, who expressed the view that ". . . in other words, . . . [section 11 would make it] unlawful for any railroad company . . . to have or hold any interest, directly or indirectly, in any of the stocks or bonds, or in any other manner, in any water transportation company." 48 *Cong. Rec.* 6928 (1912). This position, however, is not consistent with the interpretation of section 11 advanced by its supporters, nor indeed is it consistent with the words of the legislation itself, which "grandfathered" certain railroads by authorizing the Commission to find that railroads that owned water carriers prior to enactment of section 11 could continue to do so.[4]

Senate debates of section 11 also indicate that the intent of Congress was to prohibit relationships with possible adverse impacts on competition. In those debates, Senator Gallinger directly inquired of Senator Smith regarding the meaning of the restrictions imposed by section 11.

> *Mr. Gallinger.* . . . Am I correct in the supposition that if either the provision of the House bill or the Senate committee amendment becomes a law all steamships owned by railroads, whatever that may mean, will be prohibited from passing through the Panama Canal?
>
> *Mr. Smith.* No; I do not think so. It will be from where the operation by water was in competition with their operation by rail. The measure is intended

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[4] This grandfather clause was amended by the Transportation Act of 1940 to authorize the Commission to permit *new* acquisitions by railroads of competing water carriers. *See* Transportation Act of 1940, Pub. L. No. 76-785, § 7, 54 Stat. 898, 909-10 (1940) (codified as amended at 49 U.S.C. § 11321(b)).

to prevent cooperation where the line could be considered competing.

48 *Cong. Reg.* 10460 (1912)

As Senator Gallinger's comments indicate where competition between the railroad and the water carrier is not possible, the limitation explicitly does not apply. Likewise, a relationship between a railroad and a water carrier that cannot in any way affect competition is not a prohibited interest. In sum, the test of whether an interest is prohibited by section 11321 is whether the relationship enables the railroad to adversely affect competition from water carriers, rather than whether the railroad can exercise control over a water carrier.

We conclude that a relationship between a railroad and a water carrier arising solely because of the existence of an independent voting trust satisfying our Voting Trust Guidelines is not an interest in a water carrier prohibited by 49 U.S.C. 11321. The independent voting trust not only insulates the water carrier from control by the railroad, it also prevents the railroad from influencing water carrier competition, so long as no other relationships with the water carrier exist. Inasmuch as petitioner has alleged no present facts showing any relationship between CSX and ACL or ACBL other than the existence of a proper independent voting trust, there is no need to institute a declaratory order proceeding.

WTA also asserts that CSX will be able to influence water carrier competition irrespective of the voting trust and will have an incentive to do so.[5] We do not con-

[5] WTA contends that the voting trust agreement is deficient because it does not prohibit the officers and directors of CSX and ACL from consulting with each other. The voting trust agreement governs behavior relating to the interaction of the trustee and trust settlor to ensure that the latter cannot exercise control over the company whose stock is trusteed. Restrictions on actions of persons not parties or signators to the trust agreement, and thus not

sider a declaratory order proceeding to be an appropriate forum for considering speculative future violations of the law. If CSX acquires control of Texas Gas and if CSX management proceeds to coordinate competitive operations with ACL regardless of the voting trust, then a violation of section 11321 might exist such as was found in *Nicholson Universal*. Moreover, a violation of section 11343 might also occur. In the event of any such violation, a complaint action would be the appropriate remedy.

Our concern here is limited to whether the relationship arising from CSX's acquisition of Texas Gas (if its tender offer is successful) subject to the terms of the voting trust, would be a prohibited interest. In this respect, WTA's arguments regarding unregulated carriers and vessels outside the voting trust are not persuasive. WTA is correct that the prohibitions of section 11321 apply to any vessel, not just to regulated water carriers. However, at this time there have been no allegations of any particular vessels or carriers owned or controlled by Texas Gas that are not part of the trust agreement. If such vessels or carriers exist, CSX must avoid acquiring an interest in them as a result of its tender offer if those vessels or carriers perform operations in competition with CSX's railroad subsidiaries. At present, such potential future violations as a result of possible failure to include competing vessels in the voting trust is speculative. The voting trust itself is sufficient to avoid violations of section 11321 with respect to the carriers it includes.

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relating to the interaction between the trustee and settlor, would constitute unenforceable and irrelevant provisions in the trust agreement.

If CSX should influence ACL through contacts between the officers and directors of the respective companies in the normal course of business, that conduct might violate sections 11321 and/or 11343, depending upon the nature of the influence, and appropriate relief would be available to remedy the violation.

We specifically reject WTA's argument that an independent voting trust as a matter of law cannot insulate a carrier from its acquired "interest" in a water carrier in the same manner as a voting trust is said to insulate a carrier from "control" of another carrier on an interim basis pending final action in a section 11343 proceeding. Petition at 9-10. WTA essentially argues that because section 11321 prohibits acquisition of an "interest" without prior Commission approval, and section 11343 merely prohibits acquistion of "control," section 11321's prohibition is much broader in scope and, therefore, voting trust may not be used where any "interest" of a water carrier remains, as in this instance, with a rail carrier. We do not agree with WTA that the provisions of section 11321 are sufficiently different from those of section 11343, so that voting trusts, and the body of law developed around independent voting trusts, cannot operate in the same manner under the two provisions. We therefore reject the argument that those cases holding that placing stock in an independent voting trust constitutes a divestiture of control have no application to transactions under section 11321. See *B. F. Goodrich Co.* v. *Northwest Industries, Inc.*, 303 F. Supp. 53, 61 (D. Del. 1969), *aff'd* 424 F. 2d 1349 (3rd Cir. 1970), *cert. denied*, 400 U.S. 822 (1971); *Illinois Central R. Co.* v. *United States*, 263 F. Supp. 421, 429 (N.D. Ill. 1966), *aff'd per curiam*, 385 U.S. 457 (1967).

WTA's arguments that the voting trust creates financial interests which give CSX an incentive for anticompetitive conduct also are not persuasive. First, we are not convinced that CSX has any incentive to have its railroad subsidiaries reduce their rates below an optimum level in order to favor ACL and its subsidiaries. This would involve a trading off of rail revenues for barge revenues. While the trade off might not be precisely dollar for dollar, the incentive to engage in this conduct is still questionable. Further, this type of con-

duct would relate to favoring one water carrier connection over others. It would not relate to competition between water carriers and railroads. As the express language of section 11321 and as Representative Adamson's comments quoted above make clear, the statute does not prohibit railroad control of connecting water carriers. Section 11321 addresses railroad interests in directly competing water carriers. If, in the future, CSX and ACL take any cooperative action to reduce competition between their respective railroad and water carrier subsidiaries, a prohibited interest could be created in violation of the law. Finally, we note again that an independent voting trust of the type entered into here is merely a temporary device designed to avoid a technical violation of the law in the context of a corporate acquisition. It is not, and cannot, be a device for holding stock on a permanent basis. This fact alone largely prevents the voting trust device from becoming a tool for altering rail-water competitive relationships. If the proposed acquisition is consummated, then CSX will have to file a control application before the voting trust can be terminated, unless the stock is sold to a third party. All issues cognizable under 49 U.S.C. 11343 and 11321 will be addressed in the control proceeding.

We will not issue an interim ruling on the voting trust agreement as required by CSX and Texas Gas. Our Voting Trust Guidelines provide for informal staff review of voting trust agreements. Those procedures have been followed here and modifications to the agreement have been made in accordance with staff advice. No need has been shown for a formal decision on the agreement and, in accordance with our usual practice, none will be issued.

WTA has requested that its petition be made part of the record in any proceeding in which CSX seeks approval to acquire control of ACL. That request is not appropriate in this proceeding. If CSX files an application seeking authority to acquire ACL, a proceeding will be in-

stituted and public notice will be given. WTA may at that time submit any evidence or arguments it chooses.

The petition will be denied.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The petition of Water Transport Association for declaratory order is denied.

2. The motion of water Transport Association for an enjoining order is denied and its reply to CSX-Texas Gas is rejected.

3. The decision shall be effective on its date of service.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison. Commissioner Andre was absent and did not participate.

AGATHA L. MERGENOVICH
Secretary

[SEAL]

JUDGMENT—Filed August 4, 1983

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

No. 83-1737

WATER TRANSPORT ASSOCIATION,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

CSX CORPORATION and
TEXAS GAS RESOURCES CORPORATION,
EASTERN COAL TRANSPORTATION CONFERENCE,
Intervenors

[Filed Aug. 4, 1983]

Petition for Review of an Order of the
Interstate Commerce Commission

Before: Wald and Scalia, Circuit Judges, and Harold H. Greene,* District Judge for the District of Columbia

JUDGMENT

These review proceedings were initiated on July 7, 1983, when the petitioner herein, Water Transport As-

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

sociation, filed a petition seeking review of an order of the Interstate Commerce Commission which had held that a tender offer by Intervenor CSX Corporation to acquire Intervenor Texas Gas Resources Corporation did not violate the Panama Canal Act, 49 U.S.C. § 11,321. By order entered the following day, July 8, 1983, this Court enjoined Intervenor CSX Corporation, its officers, agents and employees, and all persons acting in concert with CSX Corporation, from acquiring American Commercial Barge Lines, Inc., (which is owned by Intervenor Texas Gas Resources Corporation) pending appeal, and expedited this case for consideration and disposition on the merits. Thereafter, this case was briefed and argued by counsel. Upon consideration of the foregoing, it is

ORDERED and ADJUDGED, by this Court, that the order of Respondent Interstate Commerce Commission on review herein is affirmed, with the proviso that the Commission may authorize Intervenor CSX Corporation to proceed with the tender offer only if CSX Corporation agrees to hold the stock in American Commercial Barge Lines, Inc., in a temporary voting trust, in conformity with applicable Interstate Commerce Commission regulations and as reviewed and approved by Commission staff, until the Commission has approved the transaction after a full hearing, all in accordance with the opinion for the Court filed herein this date in photocopy form. And it is

FURTHER ORDERED, by this Court, that the injunction barring Intervenor CSX Corporation from acquiring stock in American Commercial Barge Lines, Inc., pending this appeal, as provided in this Court's order filed July 8, 1983, will be dissolved effective at 7:00 p.m., E.D.T., on August 5, 1983. And it is

FURTHER ORDERED, by this Court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely

petition for rehearing. *See* Local Rule 14, as amended on November 30, 1981, and June 15, 1982.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: August 4, 1983.

Opinion for the Court filed by Circuit Judge Wald.

Dissenting opinion filed by District Judge Greene.

ORDER—Filed August 6, 1983

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

No. 83-1737

WATER TRANSPORT ASSOCIATION,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

CSX CORPORATION and
TEXAS GAS RESOURCES CORPORATION,
EASTERN COAL TRANSPORTATION CONFERENCE,
Intervenors

[Filed Aug. 6, 1983]

Before: Wald and Scalia, Circuit Judges, and Harold H. Greene,* District Judge for the District of Columbia

ORDER

On consideration of the Petition for Rehearing filed herein by Petitioner on August 6, 1983, it is

ORDERED by the Court that the aforesaid Petition is denied.

Per Curiam

For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

District Judge Greene voted to grant the Petition.

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

ORDER—Filed August 6, 1983

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

No. 83-1737

WATER TRANSPORT ASSOCIATION,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

CSX CORPORATION and
TEXAS GAS RESOURCES CORPORATION,
EASTERN COAL TRANSPORTATION CONFERENCE,
Intervenors

[Filed Aug. 6, 1983]

Before: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges

ORDER

The Suggestion for Rehearing en banc, filed by Petitioner on August 6, 1983, having been circulated to the full court and a majority of the circuit judges who are in regular active service not having voted in favor thereof, it is

ORDERED by the Court, en banc, that the aforesaid Suggestion is denied.

Per Curiam

For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judges Wright, Wilkey, Mikva, Edwards and Ginsburg did not participate in this order.

Circuit Judge Bork would defer consideration of the Suggestion, but would, nonetheless, deny petitioner's motion for stay.

ORDER—Filed October 28, 1983

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

No. 83-1737

WATER TRANSPORT ASSOCIATION,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

CSX CORPORATION, *et al.*,
Intervenors

[Filed Oct. 28, 1983]

Before: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Bork and Scalia, Circuit Judges

ORDER

Upon consideration of petitioner's motion for reconsideration of order denying suggestion for rehearing *en banc*, it is

ORDERED, by the Court, *en banc*, that petitioner's aforesaid motion for reconsideration is denied.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

49 U.S.C. § 11321 (Supp. V 1981)

§ 11321. Limitation on ownership of certain water carriers

(a) (1) Notwithstanding sections 11343 and 11344 of this title, a carrier, or a person controlling, controlled by, or under common control with a rail, express, sleeping car, or pipeline carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may not own, operate, control, or have an interest in a water common carrier or vessel carrying property or passengers on a water route with which it does or may compete for traffic.

(2) The Commission may decide, after a full hearing, questions of fact related to competition or the possibility of competition under this subsection on application of a carrier. A carrier may file an application to determine whether an existing service violates this subsection and may request permission to continue operation of a vessel or that action be taken under subsection (b) of this section. The Commission may begin a proceeding under this subsection on its own initiative or on application of a shipper to investigate the operation of a vessel used by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter if the carrier has not applied to the Commission and had the question of competition or the possibility of competition determined under this subsection.

(b) Notwithstanding subsection (a) of this section, the Commission may authorize a carrier providing transportation subject to the jurisdiction of the Commission under that subchapter to own, operate, control, or have an interest in a water common carrier or vessel that is not operated through the Panama Canal and with which the carrier does or may compete for traffic when the Commission finds that ownership, operation, control, or

interest will still allow that water common carrier or vessel to be operated in the public interest advantageously to interstate commerce and that it will still allow competition, without reduction, on the water route in question. However, section 11343 of this title also applies to a transaction or interest under this subsection if the transaction or interest is within the scope of that section. The Commission may begin a proceeding under this subsection on application of a carrier. An authorization under this subsection is not necessary for a carrier that obtained an order of extension before September 18, 1940, under section 5(21) of the Interstate Commerce Act (37 Stat. 567), as amended, if the order is still in effect.

(c) The Commission may take action under this section only after a full hearing. An order entered as a result of the action may be conditioned on giving security for the payment of an amount of money or the discharge of an obligation that is required to be paid or discharged under that order.

ACT OF AUG. 24, 1912, CH. 390, § 11, 37 STAT. 566

Sec. 11. That section five of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, is hereby amended by adding thereto a new paragraph at the end thereof, as follows:

"From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the Act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense."

Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The commission may on its own motion or the application of any shipper institute proceedings to

inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said commission shall be final.

If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation: Provided, any application for extension under the terms of this provision filed with the Interstate Commerce Commission prior to July first, nineteen hundred and fourteen, but for any reason not heard and disposed of before said date, may be considered and granted thereafter.

* * * *

49 U.S.C. § 5(15)-(17) (1976)

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(15) Interest in competing water carrier; prohibition

Notwithstanding the provisions of paragraph (2) of this section, from and after the 1st day of July 1914, it shall be unlawful for any carrier, as defined in section 1(3) of this title, or (after September 18, 1940) any person controlling, controlled by, or under common control with, such a carrier to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which such carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

(16) Determination of fact of competition

Jurisdiction is conferred on the Commission to determine questions of fact, arising under paragraph (15) of this section, as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of such paragraph and may pray for an order permitting the continuance of any vessel or vessels already in operation, or may pray for an order under the provisions of paragraph (17) of this section. The Commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or

other carrier which has not applied to the Commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said Commission shall be final.

(17) Permission of interest in competing water carrier

Notwithstanding the provisions of paragraph (15) of this section, the Commission shall have authority, upon application of any carrier, as defined in section 1(3) of this title, and after hearing, by order to authorize such carrier to own or acquire ownership of, to lease or operate, to have or acquire control of, or to have or acquire an interest in, a common carrier by water or vessel, not operated through the Panama Canal, with which the applicant does or may compete for traffic, if the Commission shall find that the continuance or acquisition of such ownership, lease, operation, control, or interest will not prevent such common carrier by water or vessel from being operated in the interest of the public and with advantage to the convenience and commerce of the people, and that it will not exclude, prevent, or reduce competion on the route by water under consideration: *Provided*, That if the transaction or interest sought to be entered into, continued, or acquired is within the scope of paragraph (2)(a) of this section, the provisions of paragraph (2) of this section shall be applicable thereto in addition to the provisions of this paragraph: *And provided further*, That no such authorization shall be necessary if the carrier having the ownership, lease, operation, control, or interest has, prior to September 18, 1940, obtained an order of extension under the provisions of paragraph (21) of this section, as in effect prior to such date, and such order is still in effect.

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49 U.S.C. §§ 11343-11344 (Supp. V 1981)

§ 11343. Consolidation, merger, and acquisition of control

(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

(1) consolidation or merger of the properties or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

(2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) acquisition of control of a carrier by any number of carriers.

(4) acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

(6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

(b) A person may carry out a transaction referred to in subsection (a) of this section or participate in achieving the control or management, including the power to exercise control or management, in a common interest of more than one of those carriers, regardless of how that result is reached, only with the approval and authorization of the Commission under this subchapter. In addi-

tion to other transactions, each of the following transactions are considered achievements of control or management:

(1) A transaction by a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(2) A transaction by a person affiliated with a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(3) A transaction by at least 2 persons acting together (one of whom is a carrier or is affiliated with a carrier) has the effect of putting those persons and carriers and persons affiliated with any of them, or with any of those affiliated carriers, taken together, in control of another carrier.

(c) A person is affiliated with a carrier under this subchapter if, because of the relationship between that person and a carrier, it is reasonable to believe that the affairs of another carrier, control of which may be acquired by that person, will be managed in the interest of the other carrier.

(d) (1) Approval and authorization by the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are motor carriers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and the aggregate gross operating revenues of those carriers were not more than $2,000,000 during a period of 12 consecutive months ending not more than 6 months before the date of the agreement of the parties covering the transaction. However, the approval and authorization of the Commission is required when a motor carrier that is controlled by or affiliated with a carrier providing transportation subject to the jurisdiction

of the Commission under subchapter I of that chapter is a party to the transaction.

(2) The approval and authorization of the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are street, suburban, or interurban electric railways that are not controlled by or under common control with a carrier that is operated as part of a general railroad system of transportation.

§ 11344. Consolidation, merger, and acquisition of control: general procedure and conditions of approval

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to in section 11343 of this title on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title is involved in the transaction, the Commission must notify the persons specified in section 10328(b) of this title. The Commission shall hold a public hearing when a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

(b) In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

(1) the effect of the proposed transaction on the adequacy of transportation to the public.

(2) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(3) the total fixed charges that result from the proposed transaction.

(4) the interest of carrier employees affected by the proposed transaction.

(5) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

(d) In a proceeding under this section which does not involve the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall approve such an application unless it finds that—

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight sur-

face transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In making such findings, the Commission shall, with respect to any application that is part of a plan or proposal developed under section 5(a)-(d) of the Department of Transportation Act (49 U.S.C. 1654(a)-(d)), accord substantial weight to any recommendations of the Secretary of Transportation.

(e) A rail carrier, or a person controlled by or affiliated with a rail carrier, together with one or more affected shippers, may apply for approval under this subsection of a transaction for the purpose of providing motor carrier transportation prior or subsequent to rail transportation to serve inadequately served shippers located on a railroad other than the applicant carrier. Such application shall be approved by the Commission if the applicants demonstrate presently impaired rail service and inadequate motor common carrier service which results in the serious failure of the rail carrier serving the shippers to meet the rail equipment or transportation schedules of shippers or seriously to fail otherwise to provide adequate normal rail services required by shippers and which shippers would reasonably expect the rail carrier to provide. The Commission shall approve or disapprove applications under this subsection within 30 days after receipt of such application. The Commission shall approve applications which are not protested by interested parties within 30 days following receipt of such application.

49 C.F.R. § 1013 (1982)

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§ 1013.1 The independence of the trustee of a voting trust.

(a) In order to avoid an unlawful control violation, the independent voting trust should be established before a controlling block of voting securities is purchased.

(b) In voting the trusteed stock, the trustee should maintain complete independence from the creator of the trust (the settlor).

(c) Neither the trustee, the settlor, nor their respective affiliates should have any officers or board members in common or direct business arrangements, other than the voting trust, that could be construed as creating an indicium of control by the settlor over the trustee.

(d) The trustee should not use the voting power of the trust in any way which would create any dependence or intercorporate relationship between the settlor and the carrier whose corporate securities constitute the corpus of the trust.

(e) The trustee should be entitled to receive cash dividends declared and paid upon the trusteed voting stock and turn them over to the settlor. Dividends other than cash should be received and held by the trustee upon the same terms and conditions as the stock which constitutes the corpus of the trust.

(f) If the trustee becomes disqualified because of a violation of the trust agreement or if the trustee resigns the settlor should appoint a successor trustee within 15 days.

§ 1013.2 The irrevocability of the trust.

(a) The trust and the nomination of the trustee during the term of the trust should be irrevocable.

(b) The trust should remain in effect until certain events, specified in the trust, occur. For example, the trust might remain in effect until (1) all the deposited stock is sold to a person not affiliated with the settlor or (2) the trustee receives a Commission decision authorizing the settlor to acquire control of the carrier or authorizing the release of the securities for any reason.

(c) The settlor should not be able to control the events terminating the trust except by filing with this Commission an application to control the carrier whose stock is held in trust.

(d) The trust agreement should contain provisions to ensure that no violations of 49 U.S.C. 11343 will result from termination of the trust.

§ 1013.3 Review and reporting requirements for regulated carriers.

(a) Any carrier choosing to utilize a voting trust may voluntarily submit a copy of the voting trust to the Commission for review. The Commission's staff will give an informal, nonbinding opinion as to whether the voting trust effectively insulates the settlor from any violation of Commission policy against unauthorized acquisition of control of a regulated carrier.

(b) Any person who establishes an independent trust for the receipt of the voting stock of carrier must file a copy of the trust, along with any auxiliary or modifying documents, with the Commission.

(c) Any carrier required to file a Schedule 13D with the Securities and Exchange Commission (17 CFR 240.13d-1) which reports the purchase of 5 percent or more of the registered securities of another I.C.C. regulated carrier (or the listed shares of a company controlling 10 percent or more of the stock of an I.C.C. regulated carrier), must simultaneously file a copy of that

schedule with this Commission, along with any supplements to that schedule.

(d) Failure to comply with the reporting requirements in paragraphs (b) or (c) of this section will result in denial of the application in which acquisition of control, through the acquisition of the voting stock of another carrier, is sought unless the applicant shows, by clear and convincing evidence, and the Commission finds, that the failure to comply was unintentional and that denial of the application will substantially and adversely effect the public interest and the national transportation policy.

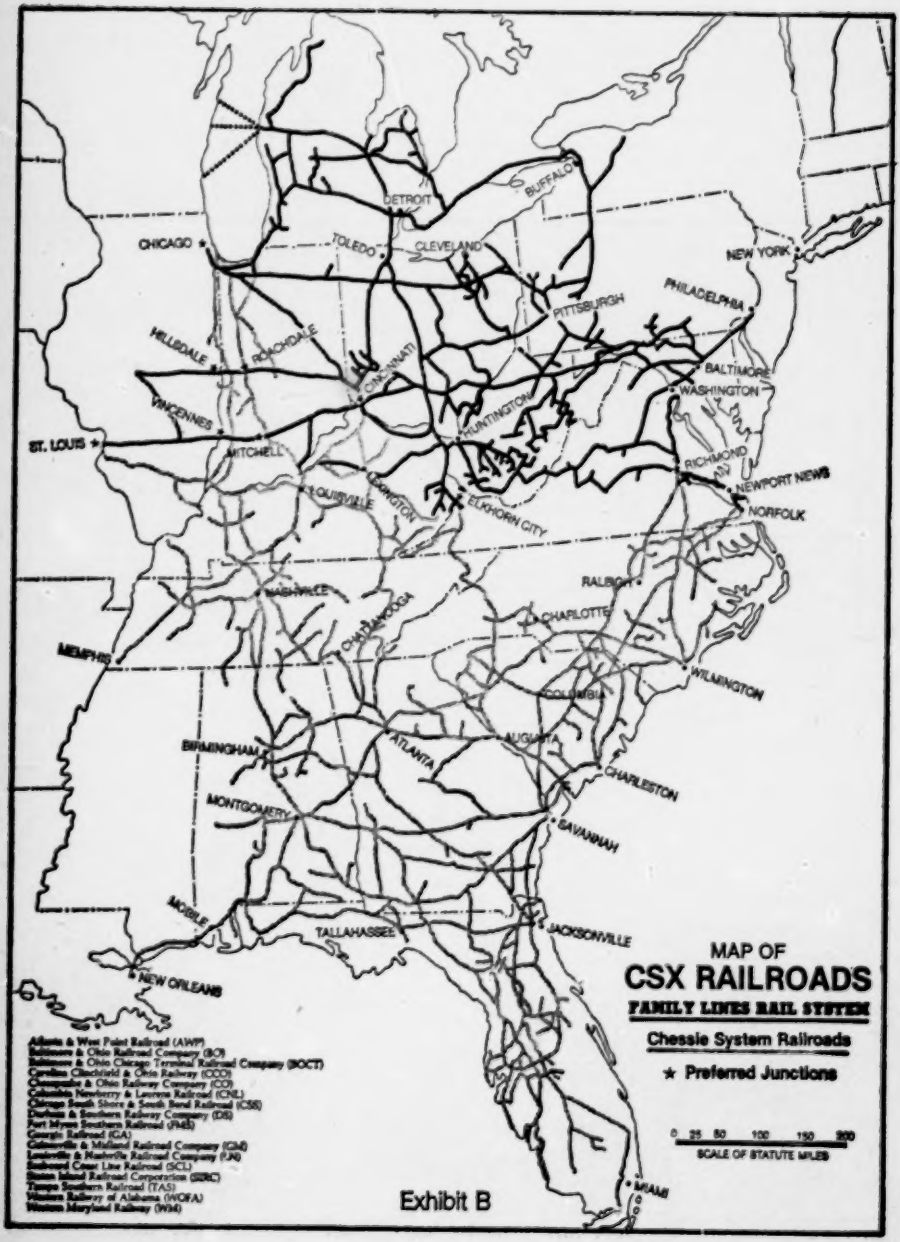
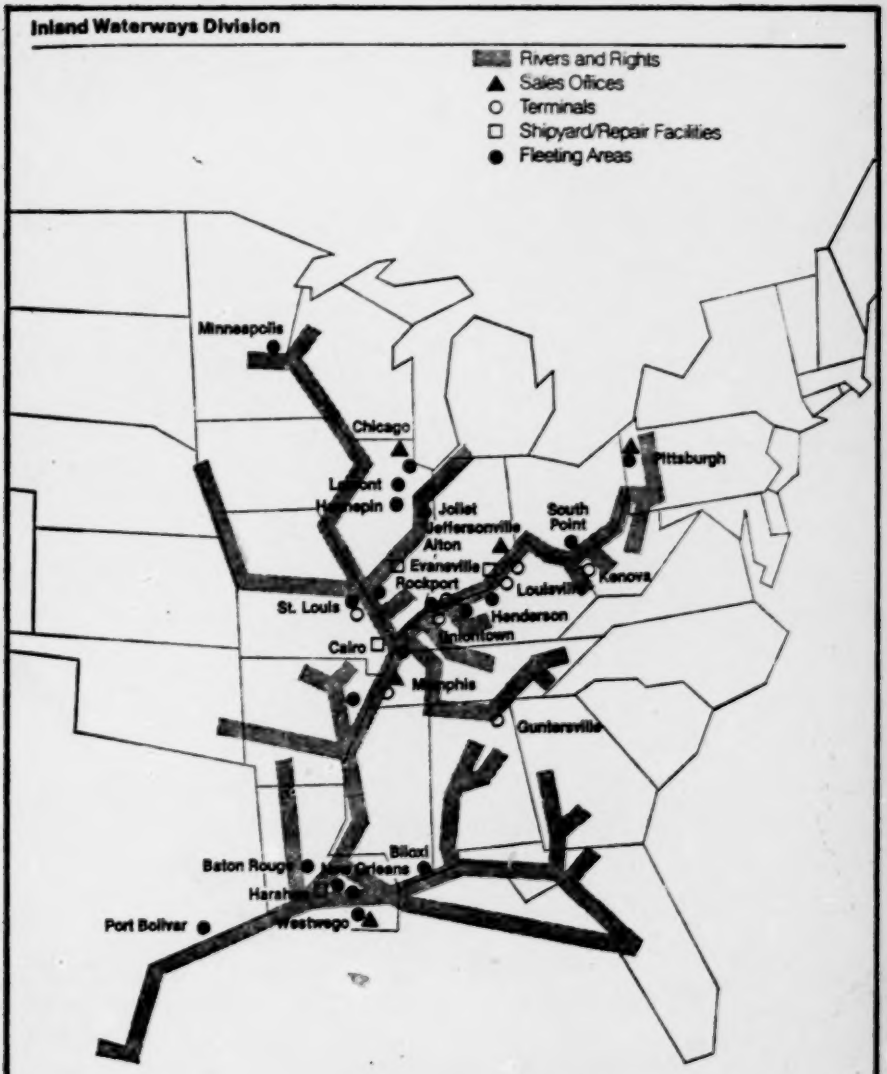

DETROIT
BUFFALO
CHICAGO
TOLEDO
CLEVELAND
NEW YORK
PHILADELPHIA
PITTSBURGH
HILLSDALE
ROCHDALE
CINCINNATI
BALTIMORE
WASHINGTON
VINCENNES
HUNTINGTON
ST. LOUIS
MITCHELL
RICHMOND
NEWPORT NEWS
LOUISVILLE
LEXINGTON
ELKHORN CITY
NORFOLK
NASHVILLE
RALEIGH
CHATTANOOGA
CHARLOTTE
MEMPHIS
WILMINGTON
COLUMBIA
BIRMINGHAM
ATLANTA
AUGUSTA
CHARLESTON
MONTGOMERY
SAVANNAH
MOBILE
TALLAHASSEE
JACKSONVILLE
NEW ORLEANS
MIAMI
Atlanta & West Point Railroad (AWP)
Baltimore & Ohio Railroad Company (BO)
Baltimore & Ohio Chicago Terminal Railroad Company (BOCT)
Carolina Clinchfield & Ohio Railway (CCO)
Columbia & Ohio Railway Company (CO)
Columbia Newberry & Laurens Railroad (CNL)
Chicago South Shore & South Bend Railroad (CSS)
Durham & Southern Railway Company (DS)
Fort Wayne Southern Railroad (FWS)
Georgia Railroad (GA)
Gainesville & Midland Railroad Company (GM)
Louisville & Nashville Railroad Company (LN)
Seaboard Coast Line Railroad (SCL)
Staten Island Railroad Corporation (SIRC)
Tampa Southern Railroad (TAS)
Western Railway of Alabama (WOFA)
Western Maryland Railway (WM)
MAP OF
CSX RAILROADS
FAMILY LINES RAIL SYSTEM
Chessie System Railroads
★ Preferred Junctions
0 25 50 100 150 200
SCALE OF STATUTE MILES

Exhibit B



American Commercial Barge Lines

Exhibit C

JUNE 13, 1983—VOTING TRUST AGREEMENT

THIS VOTING TRUST AGREEMENT, dated as of June 13, 1983, by and between TEXAS GAS TRANSMISSION CORPORATION, a Delaware corporation ("Texas Gas") and MIDLANTIC NATIONAL BANK, having its principal office at 80 Park Plaza, Newark, New Jersey 07102 (the "Trustee"),

WITNESSETH:

WHEREAS, Texas Gas owns all (1001 shares) of the Common Stock, no par value per share ("Common Stock"), of American Commercial Lines, Inc., a Delaware corporation (the "Company"), and there has been a tender offer by CSX Corp. or an affiliate thereof ("CSX"), a Virginia corporation, for common stock of Texas Gas Resources Corporation (parent of Texas Gas) that may be sufficient to empower CSX to control Texas Gas;

WHEREAS, Texas Gas wishes to deposit all such shares of the Common Stock in an independent, irrevocable voting trust, before acquisition of any Texas Gas Resources Corporation common stock by CSX, pursuant to the rules of the Interstate Commerce Commission (the "ICC"), in order to avoid any allegation or assertion that CSX is controlling or has the power to control the Company;

WHEREAS, neither the Trustee nor any of its affiliates has any officers or board members in common or any direct or indirect business arrangements or dealings (as described in Paragraph 8 hereof) with Texas Gas, CSX or any of their affiliates;

WHEREAS, the trustee is willing to act as voting trustee pursuant to the terms of this Trust Agreement and the rules of the ICC;

NOW, THEREFORE, the parties hereto agree as follows:

1. Texas Gas hereby appoints Midlantic National Bank as Trustee hereunder, and Midlantic National Bank hereby accepts said appointment and agrees to act as Trustee under this Trust Agreement as provided herein.

2. Texas Gas agrees that it will deliver to or cause to be delivered to the Trustee any certificate or certificates representing all shares of the Common Stock now owned by Texas Gas or any affiliate of Texas Gas, which certificates shall be duly endorsed or accompanied by proper instruments duly executed for transfer thereof to the Trustee, in exchange for one or more Voting Trust Certificates substantially in the form attached hereto as Exhibit A (the "Trust Certificates"), with the blanks therein appropriately filled. All shares of the Common Stock at any time deposited hereunder are hereinafter called the "Trust Stock". The Trustee shall cause all certificates representing Trust Stock to be surrendered to and cancelled by the Company, and new certificates therefor to be issued and delivered to the Trustee. Such certificates shall be registered in the name of the Trustee or its nominee.

3. The Trust Agreement shall be irrevocable by Texas Gas and its affiliates and shall terminate only in accordance with the provisions of Paragraph 7 hereof.

4. The Trustee shall be entitled and it shall be its duty to exercise any and all voting rights in respect of the Trust Stock either in person or by proxy, as hereinafter provided, including without limitation Paragraph 7(b) hereof, unless otherwise directed by a court of competent jurisdiction. The Trustee shall not exercise the voting powers of the Trust in any way so as to create any dependence or intercorporate relationship between (i) Texas Gas, CSX and their affiliates, on the one hand,

and (ii) the Company or its affiliates, on the other hand. (The term "affiliate" or "affiliates" wherever used in this Trust Agreement shall have the meaning specified in Section 11343(c) of Title 49 of the United States Code, as amended.) The Trustee shall not, without the consent of the ICC, vote the Trust Stock to elect any officer, director, nominee or representative of Texas Gas, CSX or their affiliates as an officer or director of the Company or of any affiliate of the Company. Notwithstanding the foregoing provisions of this Paragraph 4, however, the registered holder of any Trust Certificate may at any time—but only with the prior approval of the ICC—instruct the Trustee in writing to vote the Trust Stock represented by such Trust Certificate in any manner, in which case the Trustee shall vote such shares in accordance with such instructions.

5. All Trust Certificates shall be transferable on the books of the Trustee by the registered holder upon the surrender thereof properly assigned, in accordance with rules from time to time established for the purpose by the Trustee. Until so transferred, the Trustee may treat the registered holder as owner for all purposes. Each transferee of a Trust Certificate issued hereunder shall, by his acceptance thereof, assent to and become a party to this Trust Agreement, and shall assume all attendant rights and obligations.

6. Pending the termination of this Trust as hereinafter provided, the Trustee shall, immediately following the receipt of each cash dividend or any monetary distribution as may be declared and paid upon the Trust Stock, pay the same over to or as directed by Texas Gas or to or as directed by the transferee or holder of Trust Certificates hereunder as then known to the Trustee. The Trustee shall receive and hold dividends other than cash upon the same terms and conditions as the Trust Stock and shall issue Trust Certificates representing such new or additional shares to the registered hold-

ers of Trust Certificates in proportion to their respective interests.

7. (a) This Trust is accepted by the Trustee subject to the right hereby reserved in Texas Gas at any time to sell or make any other disposition of the whole or any part of the Trust Stock, whether or not an event described in subparagraph (b) below has occurred. The Trustee will at any time upon the receipt of a direction from Texas Gas, signed by its President or one of its Vice Presidents and under its corporate seal designating the person or entity to whom Texas Gas has sold or otherwise disposed of the whole or any part of the Trust Stock and certifying that such person or entity is not an affiliate of Texas Gas or CSX and has all necessary regulatory authority, if any, to purchase the Trust Stock (upon which certification the Trustee shall be entitled to rely), immediately transfer to the person or entity therein named all of the Trustee's right, title and interest in such amount of the Trust Stock as may be set forth in said direction. If such direction shall specify all of the Trust Stock, then upon transfer of the Trustee's right, title and interest therein, and in the event of a sale thereof, upon delivery to or upon the order of Texas Gas of the proceeds of such sale, this Trust shall cease and come to an end. If said direction is as to only a part of the Trust Stock, then this Trust shall cease as to said part upon such transfer, and receipt of proceeds in the event of sale, but shall remain in full force and effect as to the remaining part of the Trust Stock. In the event of a sale of Trust Stock by Texas Gas, the Trustee shall, to the extent the consideration therefor is payable or controllable by the Trustee, promptly pay, or cause to be paid, upon the order of Texas Gas the net proceeds of such sale to the registered holders of Trust Certificates in proportion to their respective interests. It is the intention of this paragraph that no violations of 49 U.S.C. §§ 11321 and 11343 will result from a termination of this Trust.

(b) In the event that Subtitle IV of Title 49 of the United States Code, or other controlling law, is amended to allow Texas Gas, CSX or their affiliates to purchase or acquire control of the Company without obtaining ICC or other governmental approval, or in the event the ICC by final order shall (i) approve the ownership by Texas Gas, CSX or their affiliates of the voting rights to the Trust Stock vested in the Trustee under this Agreement; or (ii) determine that it is without jurisdiction to approve or disapprove such ownership of such rights; or (iii) approve the control of the Company by Texas Gas, CSX or their affiliates; or (iv) approve a merger between the Company and Texas Gas, CSX or any affiliate of either; then immediately upon the delivery of a certified copy of such order of the ICC or other governmental authority with respect thereof, or an opinion of independent counsel selected by the Trustee that no order of the ICC or other governmental authority is required, the Trustee shall either (i) vote the Trust Stock with respect to any such merger between the Company and Texas Gas, CSX or any affiliate of either as directed by the transferee or holder of the Trust Certificates or (ii) transfer to or upon the order of Texas Gas, CSX or the transferee or holder of Trust Certificates hereunder as then known to the Trustee, its right, title and interest in and to all of the Trust Stock then held by it in accordance with the terms, conditions and agreements of this Trust Agreement and not theretofore transferred by it as provided in subparagraph (a) hereof, and upon such transfer this Trust shall cease and come to an end.

(c) In the event that the ICC should deny any application or petition by Texas Gas, CSX or their affiliates to merge with or otherwise acquire and/or exercise control over the Company, and such order becomes final after judicial review or failure to appeal, Texas Gas, CSX or their affiliates shall use their best efforts to sell the Trust Stock to one or more eligible purchasers during

a period of two years after such order becomes final. At all times, the Trustee shall continue to perform its duties under this Trust Agreement and, should Texas Gas, CSX or their affiliates be unsuccessful in their efforts to sell, the Trustee shall as soon as practicable sell the Trust stock for cash to one or more eligible purchasers in such manner and for such price as the Trustee in its sole discretion shall deem reasonable. (An "eligible purchaser" hereunder shall be a person or entity that is not affiliated with Texas Gas or CSX and which has all necessary regulatory authority, if any, to purchase the Trust Stock.) Texas Gas agrees to cooperate with the Trustee in effecting such disposition and the Trustee agrees to act in accordance with any recommendation made by Texas Gas as to any specific terms or method of disposition, to the extent not inconsistent with the requirements of the terms of any ICC or court order. To the extent that registration is required under the Securities Act of 1933 or any other applicable securities laws in respect of any distribution of Trust Stock as contemplated herein, Texas Gas or CSX shall reimburse the Trustee for any expenses incurred by it. The proceeds of the sale shall be distributed to or upon the order of Texas Gas or, on a pro rata basis, to the transferee or holder of Trust Certificates hereunder as then known to the Trustee. The Trustee may, in its reasonable discretion, require the surrender to it of the Trust Certificates hereunder before paying to the holder his share of the proceeds.

(d) Unless sooner terminated pursuant to any other provision herein contained, this Trust Agreement shall terminate on April 30, 1993, so long as no violation of 49 U.S.C. §§ 11321 or 11343 will result from such termination and provided that this Trust Agreement may be extended by the parties hereto as provided in Section 218 of the General Corporation Law of the State of Delaware. All Trust Stock and any other property held

by the Trustee hereunder upon such termination shall be distributed to or upon the order of Texas Gas or the transferee or holder of Trust Certificates hereunder as then known to the Trustee. The Trustee may, in its reasonable discretion, require the surrender to it of the Trust Certificates hereunder before the release or transfer of the stock interests evidenced thereby.

(e) The Trustee shall promptly inform the ICC of any transfer or disposition of Trust Stock pursuant to this Paragraph 7.

8. Neither the Trustee nor any affiliate of the Trustee may have (i) any officers, or members on their respective boards of directors, in common with Texas Gas, CSX or any affiliate of either, or (ii) any direct or indirect business arrangements or dealings, financial or otherwise, with Texas Gas, CSX or any affiliate of either, other than these dealings pertaining to establishment and carrying out of this voting trust. Mere investment in the stock or securities of any affiliate of Texas Gas or CSX by the Trustee, short of obtaining a controlling interest, will not be considered a proscribed business arrangement or dealing. But in no event shall the investment by the Trustee in voting securities of Texas Gas, CSX or their affiliates exceed 5 percent of their outstanding voting securities and in no event shall the Trustee hold a proportion of such voting securities so substantial as to permit the Trustee in any way to control or direct the affairs of Texas Gas, CSX or their affiliates.

9. The Trustee shall be entitled to receive reasonable and customary compensation for all services rendered by it as Trustee under the terms hereof and said compensation to the Trustee, together with all counsel fees, taxes, or other expenses reasonably incurred hereunder, shall be promptly paid by Texas Gas.

10. The Trustee may at any time or from time to time appoint an agent or agents and may delegate to such

agent or agents the performance of any administrative duty of the Trustee.

11. The Trustee shall not be answerable for the default or misconduct of any agent or attorney appointed by it in pursuance hereof if such agent or attorney shall have been selected with reasonable care. The duties and responsibilities of the Trustee shall be limited to those expressly set forth in this Trust Agreement. The Trustee shall not be responsible for the sufficiency or accuracy of the form, execution, validity or genuineness of the Trust Stock, or of any documents, or of any endorsement thereon, or for any lack of endorsement thereof, or for any description therein, nor shall the Trustee be responsible or liable in any respect on account of the identity, authority or rights of the persons executing or delivering or purporting to execute or deliver, any such Trust Stock or document or endorsement on this Trust Agreement, except for the execution and delivery of this Trust Agreement by the Trustee. Texas Gas agrees that it will at all times protect, indemnify and save harmless the Trustee from any loss, cost, or expense of any kind or character whatsoever in connection with this Trust except those, if any, growing out of the gross negligence or willful misconduct of the Trustee, and will at all times itself undertake, assume full responsibility for, and pay all cost and expense of any suit or litigation of any character, including any proceedings before the ICC, with respect to the Trust Stock or this Trust Agreement, and if the Trustee shall be made a party thereto, Texas Gas will pay all costs and expenses, including counsel fees, to which the Trustee may be subject by reason thereof. The Trustee may consult with counsel and the opinion of such counsel shall be full and complete authorization and protection in respect of any action taken or omitted or suffered by the Trustee hereunder in good faith and in accordance with such opinion.

12. To the extent requested to do so by Texas Gas or any registered holder of a Trust Certificate, the Trustee shall furnish to the party making such request full information with respect to (i) all property theretofore delivered to it as Trustee, (ii) all property then held by it as Trustee, and (iii) all action theretofore taken by it as Trustee.

13. The Trustee, or any trustee hereafter appointed, may at any time resign by giving sixty (60) days' written notice of resignation to Texas Gas and the ICC. Upon receiving such notice of resignation, Texas Gas shall within 15 days appoint a successor trustee which shall (i) satisfy the requirements of Paragraph 8 hereof and (ii) be a corporation organized and doing business under the laws of the United States or of any State thereof and authorized under such laws to exercise corporate trust powers, having a combined capital and surplus of at least $50,000,000 and subject to supervision or examination by Federal or State authority. If no successor trustee shall have been appointed and shall have accepted appointment within 45 days after such notice of resignation, the resigning Trustee may petition any authority or court of competent jurisdiction for the appointment of a successor trustee. Upon written assumption by the successor trustee of the Trustee's powers and duties hereunder, a copy of the assumption shall be delivered by the Trustee to Texas Gas and the ICC and all registered holders of Trust Certificates shall be notified of such assumption, whereupon the Trustee shall be discharged of its powers and duties hereunder and the successor trustee shall become vested therewith. In the event of any material violation of the terms and conditions of this Trust Agreement, the Trustee shall become disqualified from acting as trustee hereunder as soon as a successor trustee shall have been selected in the manner provided by this paragraph.

14. This Trust Agreement may from time to time be modified or amended by agreement executed by the Trustee, Texas Gas and all registered holders of Trust Certificates (i) pursuant to an order of the ICC, (ii) with the prior approval of the ICC, (iii) in order to comply with any order of the ICC or (iv) upon receipt of an opinion of counsel satisfactory to the Trustee and the holders of Trust Certificates that an order of the ICC approving such modification or amendment is not required.

15. The provisions of this Trust Agreement and of the rights and obligations of the parties hereunder shall be governed by the laws of the State of Delaware, except that to the extent any provision hereof may be found inconsistent with the Interstate Commerce Act or regulations promulgated thereunder by the ICC as presently in effect, such Act and regulation shall control and such provision hereof shall be given effect only to the extent permitted by such Act and regulations. In the event that the ICC shall, at any time hereafter by final order find that compliance with law requires any other or different action by the Trustee than is provided herein, the Trustee shall act in accordance with such final order instead of the provisions of this Trust Agreement.

16. This Trust Agreement is executed in triplicate, each of which shall constitute an original, and one of which shall be retained by Texas Gas, the second of which shall be held by the Trustee, and the third of which shall be lodged at the registered office of the Company.

17. A copy of this Trust Agreement and any amendments or modifications thereto shall be filed with the ICC by Texas Gas.

18. This Trust Agreement shall be binding upon the successors and assigns of the parties hereto, including without limitation successors to Texas Gas by merger, consolidation or otherwise.

19. This Trust Agreement supersedes and replaces the Voting Trust Agreement between the parties dated as of June 10, 1983.

IN WITNESS WHEREOF, TEXAS GAS TRANSMISSION CORPORATION has caused this Trust Agreement to be executed by its Senior Vice President, and its corporate seal to be affixed, attested by its counsel, and MIDLANTIC NATIONAL BANK has caused this Trust Agreement to be executed by its Vice President & Trust Counsel and its corporate seal to be affixed, attested to by its Trust Officer the day and year first above written.

TEXAS GAS TRANSMISSION CORPORATION

Attest:

/s/ Eugene D. Gulland

By /s/ Denill Cody
Senior Vice President

Attest:

MIDLANTIC NATIONAL BANK

/s/ Henry Giblin
Trust Officer

By /s/ K. Edward Jacobi
Vice President &
Trust Counsel

TEXAS GAS RESOURCES CORPORATION agrees to comply with the provisions of this Voting Trust Agreement to the full extent applicable and to use its best efforts to cause Texas Gas Transmission Corporation to

comply with the Voting Trust Agreement as long as it remains in effect.

TEXAS GAS RESOURCES CORPORATION

Attest:

/s/ Eugene D. Gulland

By /s/ Denill Cody
Senior Vice President

In the event CSX Corporation or any affiliate thereof acquires any of the common stock of Texas Gas Resources Corp., CSX CORPORATION agrees to comply with the provisions of this Voting Trust Agreement to the full extent applicable and to use its best efforts to cause Texas Gas Resources Corporation and its affiliates to comply with the Voting Trust Agreement as long as it remains in effect.

Attest: CSX CORPORATION

/s/ [Illegible]

By /s/ John W. [Illegible]
Senior Vice President

EXHIBIT A

No. ———————— ——————Shares

VOTING TRUST CERTIFICATE
for
COMMON STOCK,
NO PAR VALUE
of
AMERICAN COMMERICAL LINES, INC.
INCORPORATED UNDER THE LAWS OF
THE STATE OF DELAWARE

THIS IS TO CERTIFY that ———————— will be entitled, on the surrender of this Certificate, to receive on the termination of the Voting Trust Agreement hereinafter referred to, or otherwise as provided in Paragraph 7 of said Voting Trust Agreement, a certificate or certificates for 1001 shares of the Common Stock, no par value, of American Commercial Lines, Inc., a Delaware corporation (the "Company"). This Certificate is issued pursuant to, and the rights of the holder hereof are subject to and limited by, the terms of a Voting Trust Agreement, dated as of June 13, 1983, executed by Texas Gas Transmission Corporation, a Delaware corporation, and Midlantic National Bank, as Voting Trustee, a copy of which Voting Trust Agreement is on file in the registered office of said corporation at The Corporation Trust Co., 100 West Tenth St., Wilmington, Delaware 19801, and open to inspection of any stockholder of the Company and the holder hereof. The Voting Trust Agreement, unless earlier terminated (or extended) pursuant to the terms thereof, will terminate on April 30, 1993, so long as no violation of 49 U.S.C. §§ 11321 and 11343 will result from such termination.

The holder of this Certificate shall be entitled to the benefits of said Voting Trust Agreement, including the right to receive payments equal to the cash dividends,

if any, paid by the Company with respect to the number of shares represented by this Certificate.

This Certificate shall be transferrable only on the books of the undersigned Voting Trustee or any successor, to be kept by it, on surrender hereof by the registered holder in person or by attorney duly authorized in accordance with the provisions of said Voting Trust Agreement, and until so transferred, the Voting Trustee may treat the registered holder as the owner of this Voting Trust Certificate for all purposes whatsoever, unaffected by any notice to the contrary.

By accepting this Certificate, the holder hereof assents to all the provisions of, and becomes a party to, said Voting Trust Agreement.

IN WITNESS WHEREOF, the Voting Trustee has caused this Certificate to be signed by its officer duly authorized.

Dated:

MIDLANTIC NATIONAL BANK
VOTING TRUSTEE

By /s/ K. Edward Jacobi
Authorized Officer

[FORM OF BACK OF VOTING TRUST CERTIFICATE]

FOR VALUE RECEIVED ———————— hereby sells, assigns, and transfers unto ———————— the within Voting Trust Certificate, and all rights and interests represented thereby, and does hereby irrevocably constitute and appoint ———————— Attorney to transfer said Voting Trust Certificate on the books of the within mentioned Voting Trustee, with full power of substitution in the premises.

———————————

Dated:

In the Presence of:

———————————

LETTER OF LOUIS E. GITOMER

INTERSTATE COMMERCE COMMISSION

Washington, D.C. 20423

OFFICE OF PROCEEDINGS

June 20, 1983

Eugne D. Gulland, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, DC 20044

Dear Mr. Gulland:

This is in reference to your letter of June 14, 1983, which contained an executed voting trust agreement dated as of June 13, 1983, between Texas Gas Transmission Corporation (Texas Gas) and Midlantic National Bank. Texas Gas has placed in a voting trust all of the shares of American Commercial Lines, Inc. (ACL). The June 14 agreement, which has also been executed by CSX Corporation (CSX) and the parent of Texas Gas, Texas Gas Resources Corporation (Resources), supersedes and replaces a voting trust agreement between the same parties, dated June 10, 1983. Your letter indicated that the agreement was prepared and executed to include provisions suggested by Commission staff in the course of consultations pursuant to 49 CFR 1013.3(a).

I have reviewed the revised voting trust agreement and conclude that the voting trust arrangement effectively insulates Texas Gas and Resources, as well as CSX, (if CSX should acquire control of Resources), from being able to exercise control over ACL.

Accordingly, this letter serves as an informal nonbinding Commission opinion that the revised voting trust agreement, as submitted does effectively insulate Texas Gas, Resources and CSX from violation of the Commission's policy against an unauthorized acquisition of control of a regulated carrier.

I trust the foregoing is of assistance to you.

Sincerely yours,

/s/ Louis E. Gitomer
LOUIS E. GITOMER
Deputy Director
Rail Section

ORDER—Filed August 5, 1983

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

No. 83-1737

WATER TRANSPORT ASSOCIATION,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA,
Respondents

CSX CORPORATION and
TEXAS GAS RESOURCES CORPORATION,
EASTERN COAL TRANSPORTATION CONFERENCE,
Intervenors

Filed Aug. 5, 1983

Before: Wald and Scalia, Circuit Judges, and Harold H. Greene,* District Judge for the District of Columbia

ORDER

Upon consideration of petitioner's emergency motion for continuance of injunction pending disposition of rehearing proceedings, of the response filed by intervenors

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

CSX Corporation and Texas Gas Resources Corporation, and the Court being advised that petitioner has submitted a request to the Supreme Court of the United States for emergency relief, it is

ORDERED, by the Court, that the injunction barring intervenor CSX Corporation from acquiring stock in American Commercial Barge Lines, Inc., pending this appeal, as provided in this Court's order of July 8, 1983, now scheduled to be dissolved at 7:00 p.m., E.D.T., on August 5, 1983, is extended for a period of twenty four (24) hours in order to facilitate considerations by the Supreme Court of the application for emergency relief submitted earlier today. Accordingly, unless a further extension is ordered by the Supreme Court, this Court's aforesaid injunction will be dissolved at 7:00 p.m., E.D.T., August 6, 1983.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

ORDER—Filed August 6, 1983

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

No. 83-1737

WATER TRANSPORT ASSOCIATION,
Petitioner

v.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA,
Respondents

CSX CORPORATION and
TEXAS GAS RESOURCES CORPORATION,
EASTERN COAL TRANSPORTATION CONFERENCE,
Intervenors

Filed Aug. 6, 1983

Before: Wald and Scalia, Circuit Judges, and Harold H. Greene,* District Judge for the District of Columbia

ORDER

On consideration of Petitioner's emergency motion for injunction to protect appellate jurisdiction and of the response thereto filed by Intervenor CSX Corporation and Texas Gas Resources Corporation, it is

Ordered, by the Court, that Petitioner's motion is denied.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

LETTER OF CHRISTOPHER W. VASIL

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

August 8, 1983

Received Aug. 09, 1983

Alan M. Wiseman, Esq.
Howrey & Simon
1730 Pennsylvania Avenue, N.W.
Washington, DC 20006

RE: Water Transport Association
v. Interstate Commerce Commission,
et al.

A-88

Dear Mr. Wiseman:

Your application for an injunction in the above-entitled case has been presented to Justice Brennan, who has endorsed thereon the following:

"Denied
Wm. J. Brennan, Jr.
8/5/83."

Your re-application for an injunction in the above-entitled case was presented to Justice Powell, who endorsed thereon the following:

"Denied
L.F.P.
8/6/83."

Very truly yours,
ALEXANDER L. STEVAS
Clerk

By /s/ Christopher W. Vasil
CHRISTOPHER W. VASIL
Deputy Clerk

gtb
cc: The Honorable Rex E. Lee, Solicitor General
Counsel of record

PARENTS, SUBSIDIARIES (EXCEPT WHOLLY-OWNED SUBSIDIARIES) AND AFFILIATES OF WATER TRANSPORT ASSOCIATION MEMBERS

The Ohio River Company: Midland Enterprises Inc.; Midland Affiliated Company; Eastern Gas and Fuel Associates; Boston Tow Boat Company; Chotin Transportation, Inc.; Eastern Associated Terminals Company; Mystic Steamship Corporation; Omega Properties, Inc.; Orgulf Transport Co.; Red Circle Transport Co.; Midland Properties Inc.; Capital Marine Supply, Inc.; Hartley Marine Corp.; Inland Water Propulsion Systems, Inc.; Port Allen Marine Service, Inc.; The Ohio River Terminals Company; Algonquin Energy, Inc.; Boston Gas Company; Massachusetts LNG Incorporated; Boston Gas Products, Inc.; Coal Properties Corp.; Associated Coal Sales Corp.; Charles Coal Company; Colony Bay Coal Company; Eastern Associated Coal Corp.; Affinity Mining Company; Castner, Curran & Bullitt, Inc.; EACC Camps, Inc.; Eastern Associated Trading Corp.; Second Sterling Corp.; Sterling Smokeless Coal Company; Sterling Smokeless Fuel Corp.; Eastern Royalty Corp.; Eastern Associated Real Estate Corp.; Eastern Exploration Corporation; Eastern Realty Corp.; Eastern Urban Services, Inc.; EG Leasing Corp.; PCC Land Company, Inc.; Philadelphia Coke Co., Inc.; The Eastern Associated Foundation; Western Associated Coal Corp.; Beacon Coal Corp.; Chatham Coal Company; Canyon Coal Corp.; Powderhorn Coal Company; Delta Properties Corp.; Grand Mesa Properties Co.; Eastern Associated Properties Corp.; North Fork Energy Corp.; Blue Ribbon Coal Company; River Properties Corp.; Powerhorn Properties Company; Roaring Fork Coal Corp.; Snowmass Coal Company; Tremont Coal Corp.; Grand Mesa Coal Co.; Western Associated Energy Corp.; Western Associated Properties of Colorado Corp.; Western Associated De-

velopment Corp.; Cherokee Petroleum Corp.; Abnaki Oil and Gas Company; Huron Petroleum Corp.; Iroquois Oil and Gas Corp.; Mohawk Oil and Gas Corp.; Shawnee Petroleum Corp.; Taconic Corp.; Energetics Capital Joint Venture.

Columbia Transportation: Canadia Ferro Hot Metal Specialties Limited; Central Silica Company; Laxara, Inc.; Licking River Terminal Company; Oglebay Norton Taconite Company; ON Coast Petroleum Company; Once Eveleth Company; Pringle Transit Company; Saginaw Mining Company; Superior Land Company; T&B Foundry Company; Texas Mining Company; The Cleveland Metal Stamping Company; Travis Manufacturing Company; Eveleth Expansion Co.; Eveleth Taconite Co.; Columbia Transportation Co.

Dixie Carrier, Inc.: Kirby Exploration Company; Kirby Acquisition Company; Canadian Kirby Petroleum, Ltd.; Caribbean Data System, Inc.; Chemical Towing Company; Davenport Data Processors, Inc.; Kirby Investment Corporation; Kirby Petroleum del Ecuador, S.A.; Kirby Petroleum (Scotland) Limited; Kirby Securities Corporation; Materiels Technology Corporation; Universal Insurance Company; Ellis Towing & Transportation Co.; The Mariner Assurance Company Limited; Bolivar Terminal Company, Inc.; Precision EPI Corporation; Silicon Materials Services, Inc.; Caribbean Data System, Inc.; Richport Reinsurance Company, Ltd.; American General Investors, Inc.; Universal Life Insurance Company; Continental Finance Co.

Federal Barge Lines, Inc.: HNG Oil Company; HNG Fossil Fuels Company; HNG Petrochemicals, Inc.; Houston Pipe Line Company; Intratex Gas Company; Coal Properties Corporation; Valley Pipe Lines, Inc.; Zeigler Coal Company; Zato Industries, Inc.; Jefferson Oil & Gas Corporation; Bell & Zoller Coal Company; Hofiat Coal Company; Central Coal Lands, Inc.; Riverside Farms Company; Oasis Pipe Line Company; HT Gathering Com-

pany; Middle East Sulfur Company; Cors Dock Corporation; San Marco Pipeline Company; The Bermuda Company; Gulf Company Ltd.; Liquid Carbonic Corporation; Liquid Carbonic International Corporation; Mars Beach Corporation; Harders Company, Limited; Wall Chemicals, Inc.; Allstate Gases of New Hampshire, Inc.; Carbide Reduction, Inc. (N.J.); Evans Gas and Chemicals Incorporated; Carbide Reduction, Inc. (N.Y.); vans Air Products Incorporated; Columbus Oxygen Company, Inc.; Allstate Gases Incorporated; Krystal Oxygen Company; Arrow Welding Supply; New England Oxygen Corporation; Buckeye Oxygen Company; Omnock Properties, Inc.; Liquid Carbonic Canada, Ltd.; Drummond Oxygen Ltd.; Imperial Oxygen Ltd.; National Oxygen (1971) Ltd.; N.S.W. Welding Supplies Ltd.; John Ritchie (1972) Ltd.; Dunn Welding Supplies, Ltd.; Welderman Supplies Co.; Maritime Oxygen Ltd.; Alberta Gas and Welding Supplies Ltd.; Diamond Welding Supplies Ltd. (S.C.); George's Bastish, Inc.; Western Welding Suppliers Ltd.; Industrial Gases and Supplies Ltd.; Canadian Anaesthetic Gases Ltd.; Vulcan Welding, Inc.; Cryco Gas, Ltd.; Crown Carbide, Ltd.; Gas Dynamics, Ltd.; Alsso Barge Lines, Inc.; Poll Industries Inc.; Marine Equipment Company; Paducah Marine Ways Incorporated; Caruthersville Shipyard Inc.; St. Louis Shipbuilding & Steel Co.; The Dixie Dredge Corporation; The Dixie Dredge Export Corporation; Quality Shipyards, Inc.; River Equipment Co.; United Barge; Offshore Equipment Company; Gulf Fleet Marine Corporation; Marine Terminals Incorporated; Marine Leasing Company; Marine Coal Sales Inc.; East Broadway Corporation; Heartland Transportation, Inc.; Gulf Mississippi International S.A.; Gulf Fleet International Inc.; Gulf Fleet U.K., Inc.; Gulf Fleet N.Y.; Gulf Fleet Supply Vessels, Inc.; Gulf Fleet Atlantic, Inc.; Gulf Fleet Marine Operations, Inc.; Gulf Fleet Crews Inc.; Gulf Fleet Jones (Ireland) Limited; Celtic Gulf Fleet Limited; DuPalice Equipment Co., Inc.; Gulf Fleet Equipment Co., Inc.; Gulf Fleet Middle East, Inc.; Offshore

Fleet International Incorporated; DuMarco International Ltd.; Gulf Fleet Arabia Company Ltd.; HNG SynFuels Company.

Igert, Inc.: Petroleum Transport, Inc.; Precision Machine Shop, Inc.; Tenn-Tom Towing.

S.C. Loveland Co., Inc.: Miss Tammy, Inc.; Holly Beth Towing, Inc.; Hammarberg, Inc.; Mayo Towing, Inc.; Augusta Towing Co., Inc.; Carter Towing Company; Dixie Chief, Inc.; T & T Towing, Inc.

Shaver Transportation Company: Kodiak Marine Transport, Inc.; Pacific Marine Communications, Inc.

SCNO Barge Lines: SCNO, Inc.; Exchange Building Corp.; Henry Crown and Company; University Exchange Corp.; Stickney Terminal Corp.; Mills-American Envelope Co.; Kruysman Inc.; Stanwood Industries Inc.; Whitting—Patterson Co.; Heinnco of Wisconsin Inc.; Crown Point Paper Products; Crown Point Envelope Co.; Aberdeen Manuf. Corp.; Finkel Outdoor Products Inc.; Cameo Curtains, Inc.; Burton—Dixie of Blacksburg, Inc.; Monroe Manuf. Corp.; CHF Industries Inc.; Gear, Inc.; Collomade Corporation; Collomade Pack Realty Co.; Monticello Realty Corporation; Broad Edge Corporation; Lindrich Corp.; Lindrich Realty Inc.; Lindrich Service Corporation; Kratex Products Inc.; Kratex of Troy, Inc.

The Valley Line Company: Airport Service, Incorporated; Orange Coast Sightseeing Company; Albe, S.A.; Albe Far East Limited; American Transit Corp.; Chromalloy American Corporation; Chromalloy Finance Corporation; Chromalloy Leasing, Inc.; Madison Service Corporation; National Seating Company; The Centor Company; Centor Center, Inc.; Transit Service Corporation; Central Barge Line, Inc.; Chromalloy Europa N.V.; Machinefabriek A. van der Linden, B.V.; Cro-Marine, Inc.; Flowers Transportation, Inc.; Blue Sky Towing Corporation; J. Russell Flowers, Inc.; Flowers Marine Service, Inc.; Flowers Transport, Inc.; Flowers Transporta-

tion Company, Ltd.; Greenville Mid-Stream, Inc.; Rickman Harbor Service, Inc.; W & M Transportation Company; Cro-Marine Transport, Inc.; Cro-Dispatching, Inc.; E.R.K. Manufacturing, Inc.; Elyria Foundry Company; Gas Turbine Corporation; Gemoco (UK) Limited; J. Caslake Limited; Industrial Applications International, Inc.; Laidig, Inc.; Missouri River Barge Lines, Inc.; Brewer Barge Lines, Inc.; Brewer Marine Services, Inc.; Brewer Towing Company; EVCO Marine, Inc.; Hou-Tex Barge Lines; The Saval Group, Inc.; American Universal Insurance Company; Canadian Universal Insurance Company Limited; Imperia Adjusting Office, Inc.; Canadian Universal Insurance Company, Incorporated; Assurers Service, Inc.; E. Givernaud, Incorporated; Maurice H. Saval Incorporated; Sabine Towing & Transportation Co., Inc.; Security Barge Lines, Inc.; A&M Fleeting and Towing, Inc.; Vicksburg Towing Company, Inc.; Societe Nouvelle de Metallugie Univecier, S.A.; Sturm Machine Co., Inc.; Swiss Albe, Inc.; Turbine Service, Ltd.; Turbine Support Europe, B.V.; Turbochrome Ltd.; Vananzetti Vibrazioni, S.P.A.

C.G. Willis, Inc.: None.

No. 83-730

In the Supreme Court of the United States

OCTOBER TERM, 1983

WATER TRANSPORT ASSOCIATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOHN BROADLEY
General Counsel

ELLEN D. HANSON
Associate General Counsel

JOHN J. MCCARTHY, JR.
Attorney

Interstate Commerce Commission
Washington, D.C. 20423

QUESTION PRESENTED

Whether the Interstate Commerce Commission properly determined that beneficial ownership by a railroad of a water carrier's stock, held temporarily in an irrevocable independent voting trust pending review by the Commission, does not violate the prohibition of 49 U.S.C. (Supp. V) 11321.

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No. 83-730

WATER TRANSPORT ASSOCIATION, PETITIONER

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 715 F.2d 581. The decision of the Interstate Commerce Commission (Pet. App. 51a-67a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 68a-70a) was entered on August 4, 1983. A petition for rehearing was denied on August 6, 1983 (Pet. App. 71a-73a). A petition for reconsideration of the order denying rehearing was denied on October 28,

1983 (Pet. App. 74a). The petition for a writ of certiorari was filed on November 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under 49 U.S.C. (Supp. V) 11321, a railroad may not "own, operate, control, or have an interest in" a competing water carrier unless the Interstate Commerce Commission has approved the transaction after a hearing. CSX Corporation (which owns several railroads) seeks to acquire control of Texas Gas Resources Corp. (Texas Gas), which owns American Commercial Barge Lines, Inc., a water carrier. Water carrier operations represent about ten percent of the revenues of Texas Gas, whose primary business is operating a natural gas pipeline.

In June 1983, Texas Gas, a public corporation, became the object of a hostile tender offer. Texas Gas sought out CSX and CSX agreed to make a tender offer for 100% of Texas Gas stock at a higher price than the hostile offer.

Texas Gas and CSX recognized that the resulting acquisition of a water carrier by CSX would require approval under 49 U.S.C. (Supp. V) 11343 (requiring Commission approval before one carrier may acquire another), and might also require Commission approval under the Panama Canal Act, as amended and codified in 49 U.S.C. (Supp. V) 11321. Pending a hearing and decision on such approval, CSX agreed to place the water carrier stock in an independent voting trust pursuant to Commission voting trust guidelines (Pet. App. 91a-102a). See 49 C.F.R. Pt. 1013. The voting trust is irrevocable and instructs the trustee, Midlantic National Bank, not to "create any dependence or intercorporate relationship" between CSX and the water carrier, nor to vote

the trust to elect any representative of CSX or Texas Gas or their affiliates as an officer or director of the water carrier (Pet. App. 92a-93a).

The voting trust agreement was submitted to the Commission for its review prior to any purchase by CSX. In its letter of transmittal, CSX committed itself to file an application for Commission approval of the water carrier acquisition "as soon as practicable" (see Pet. App. 7a) (footnote omitted). The Commission staff suggested changes in the voting trust, which CSX and Texas Gas adopted. The Commission staff then issued an "informal nonbinding * * * opinion" that the trust "does effectively insulate * * * CSX from violation of the Commission's policy against an unauthorized acquisition of control of a regulated carrier" (*id.* at 106a-107a).

2. On June 23, 1983, petitioner Water Transport Association (WTA) petitioned the Commission for a declaration that a voting trust does not satisfy the requirement of Section 11321 that a rail carrier not hold an "interest" in a water carrier without Commission approval. WTA also asked the Commission to enjoin the CSX-Texas Gas merger and to stay CSX's acquisition of Texas Gas stock.

The Commission issued a decision denying WTA's requests on June 29, 1983 (Pet. App. 51a-67a). The Commission found that the voting trust arrangement was consistent with the purpose of Section 11321—"to prohibit [rail-water] relationships with possible adverse impacts on competition" (Pet. App. 62a)—because the voting trust reasonably insulates the water carrier from railroad control, preventing significant harm to water competition during the limited period necessary to permit formal Commission review of the transaction. As the Commission stated (*id.* at 66a):

> [A]n independent voting trust of the type entered into here is merely a temporary device designed to avoid a technical violation of the law in the context of a corporate acquisition. It is not, and cannot, be a device for holding stock on a permanent basis. This fact alone largely prevents the voting trust device from becoming a tool for altering rail-water competitive relationships.

The Commission observed that Section 11321 "does not prohibit railroad control of connecting water carriers," but instead "addresses railroad interests in directly competing water carriers" (Pet. App. 66a). The Commission pointed out that it could act in the event that CSX took any steps to reduce competition despite the existence of the trust (*id.* at 63a-64a). Thus, the Commission held that a temporary independent voting trust, designed to insulate a water carrier from control by a rail carrier pending a Commission decision on the lawfulness of the merger, is not prohibited by Section 11321.

3. a. WTA sought and obtained a federal district court order temporarily restraining CSX from purchasing Texas Gas shares; this order was continued by the court of appeals pending its review of the Commission's decision. Expedited briefing and argument followed.

b. On August 4, 1983, the court of appeals affirmed the Commission's decision, with District Judge Greene dissenting (Pet. App. 1a-50a). The majority summed up its limited holding as follows (*id.* at 10a n.10) (emphasis in original):

> We uphold the voting trust only as an *interim* device to permit the ICC to hold a hearing and decide whether the two carriers compete and, if so, whether a permanent relationship between the

two carriers is in the public interest and will not reduce competition.

In reaching this conclusion, the court reviewed the legislative history of Section 11321 and Commission precedent, both of which, it found, supported the Commission's decision (Pet. App. 13a-23a). The court first traced the evolution of Section 11321 from the original Panama Canal Act of 1912, ch. 390, 37 Stat. 560 *et seq.*, which was enacted out of congressional concern about the then-current predatory behavior of railroads dominating a much weaker water carrier system. In the Act, Congress prohibited a railroad from controlling or even "hav[ing] any interest whatsoever * * * in any common carrier by water * * * with which said railroad * * * does or may compete * * *" (Pet. App. 13a) (quoting Section 11 of the Panama Canal Act, 37 Stat. 566-567). The Act authorized the Commission to decide whether actual or potential competition existed (Pet. App. 13a-14a). In addition, the Act contained a grandfather clause permitting railroads that already owned water carriers to continue to do so if the Commission determined that continued ownership was in the public interest and would not reduce water competition (*id.* at 14a). The court noted, however, that there is no indication in the language or history of the Act "that Congress focused on the question of *when*—before or after the acquisition—the ICC would determine the existence or absence of competition in the event a rail carrier proposed to buy a water carrier" (*ibid.*) (emphasis in original). In addition, the court pointed out that the statutory history sheds no light on the meaning of the term "interest" (*id.* at 15a).

The court of appeals then discussed the amendments to the Panama Canal Act that were enacted as

part of the Transportation Act of 1940, ch. 722, 54 Stat. 898 *et seq.* (Pet. App. 18a-20a). Vastly changed circumstances led to the new legislation: "the railroads were in poor financial shape and were beset by strong competition from unregulated water carriers" (*id.* at 18a). Congress, at the urging of the railroads, brought water carriers under Commission regulation. Most significantly, the Panama Canal Act was amended to permit railroads to acquire control of competing water carriers, with Commission approval following a hearing (*id.* at 18a-20a). The court observed that Congress again apparently did not focus on when the Commission would hold the hearing to consider whether competition existed and determine if the acquisition was in the public interest (*id.* at 20a).

The court of appeals next reviewed prior Commission decisions on railroad acquisitions of water carriers. Two cases involved purchase contracts contingent on Commission approval (Pet. App. 21a-22a). The court analyzed the "interest" acquired by the purchasing railroad in the contract and the "interest" acquired here by CSX through the independent, irrevocable voting trust, and found them comparable (*id.* at 25a-29a). The court noted that, in the purchase contract cases, the Commission had not found that the "interest" held by the railroad contravened the prohibition of Section 11321 against acquiring an interest prior to a hearing or Commission authorization.

The court of appeals concluded that the term "any interest whatsoever" could not be taken as literally as petitioner would read it (Pet. App. 25a). To do so, the court reasoned, would be contrary to Commission precedent in the purchase contract cases and

would frustrate the purpose of the 1940 amendment to the Panama Canal Act by practically foreclosing rail-water mergers (Pet. App. 25a-29a).[1]

c. The court of appeals lifted the stay effective 24 hours from the date of its decision. CSX then purchased a controlling interest in Texas Gas, and all the water carrier stock was deposited in the voting trust. CSX submitted an application for approval on November 4, 1983, and the Commission accepted the application for consideration on November 29, 1983 (App., *infra*, 1a-11a). In its decision accepting CSX's application, the Commission stated its intention "to complete the evidentiary record by May 30, 1984, and serve the final decision no later than 90 days thereafter" (*id.* at 4a).

ARGUMENT

The decision of the court of appeals is correct and involves an issue of first impression that had never before been addressed by a court and may never recur. Accordingly, this case does not present a question of sufficient importance to warrant review by this Court.

Petitioner essentially relies on the arguments expressed by the dissenting judge in the court of appeals. These points were considered and dispositively answered in the majority opinion (see, *e.g.*, Pet. App. 23a n.25, 26a n.28, 28a n.31, 29a). Moreover, petitioner's contention (Pet. 22) that the court's decision, which merely permits a voting trust until final disposition of the Commission's proceeding on the merits

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[1] In dissent, District Judge Greene insisted on a literal reading of the statute, which would require a full hearing and Commission authorization prior to any purchase of stock (Pet. App. 37a-50a).

of the acquisition, is a decision "permitting the second largest railroad to acquire the largest inland water carrier," is patently incorrect.

1. Petitioner first contends (Pet. 11-12) that a literal interpretation of "any interest" must govern, thereby prohibiting the acquisition by a railroad of any right or claim in a water carrier until a hearing has been held and the Commission has ruled. As the court of appeals concluded, however, such an interpretation would frustrate the congressional purpose in enacting the 1940 amendment, which explicitly permits certain joint rail-water ownership. In rejecting an absolutely literal interpretation of the "interest" prohibition, the court correctly noted (Pet. App. 26a n.28) that the statute "cannot * * * realistically be implemented without prior acquisition of some 'interest.' " The court explained that it is necessary either to adopt a nonliteral interpretation of the term "interest" (by considering some interests as not prohibited), or to reject the notion that the statute requires prior approval of acquisitions. Otherwise, it would be impossible to give "meaning and effect to the permission provision" adopted in 1940 (*ibid.*).[2]

The court of appeals observed (Pet. App. 29a) that the Commission's interpretation

> is consistent with the dual purpose of the Canal Act to permit some rail-water mergers while preserving vigorous water competition and with the congressional policy, stated in the Staggers Act, "to minimize the need for Federal regulatory control over the rail transportation system." 49 U.S.C. § 10,101(a)(2).

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[2] The court pointed out (Pet. App. 26a n.28) that petitioner's claim must be denied under either theory.

The court properly deferred to the Commission's reasonable interpretation of the statute it is charged with administering and enforcing. See, *e.g.*, *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, No. 82-34 (May 16, 1983), slip op. 20; *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981).

The court below also found the literal interpretation of "interest" advocated by petitioner to be contrary to past Commission precedent, which permitted the holding by railroads of contractual interests in water carriers (Pet. App. 23a-29a). The court compared purchase contracts and voting trusts, and found that they both are "strictly limited in time duration and * * * insulate the water carrier from railroad control pending a full ICC hearing" (*id.* at 27a). The court pointed out that, under either arrangement, "the rail carrier lacks the control over the water carrier needed to embark on major anticompetitive actions such as predatory pricing" (*id.* at 28a) (footnote omitted). Indeed, the court observed (*ibid.*) that a water carrier controlled by an independent trustee would have greater ability to compete with the purchasing railroad than a water carrier subject to a purchase contract.

Here, as the court of appeals emphasized, CSX has only a short term stake in the water carrier's future profits because of the interim nature of the voting trust (Pet. App. 28a n.31).[3] The court properly concluded (*id.* at 28a n.32) that the water carrier's independence was assured by

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[3] As noted above, the Commission has accepted CSX's application for filing, and a final Commission decision is anticipated no later than the end of August 1984. The voting trust provides for divestiture of the water carrier stock if the Commission disapproves of the transaction (Pet. App. 28a n.31).

> the ICC's voting trust guidelines (including advance ICC review of the trust agreement), the temporary nature of the voting trust, and ICC authority to remedy any attempted abuse of the trust.

2. Petitioner's attempts to buttress its argument with citations to prior Commission decisions were properly rejected by the court of appeals. First, petitioner's reliance (Pet. 12) on a passage from Chairman Eastman's concurring opinion in *Nicholson Universal S.S. Co. Ownership*, 248 I.C.C. 43, 67 (1941), is misplaced. As both the court (Pet. App. 23a n.25) and the Commission (*id.* at 57a-58a) pointed out, the majority of the Commission in *Nicholson* did not hold that a voting trust was a forbidden interest per se; rather, the majority found that impermissible control existed regardless of the voting trust. In his concurring opinion, Chairman Eastman was speaking for himself, not the Commission.

Petitioner also relies (Pet. 13) on *Investigation of Seatrain Lines, Inc.*, 206 I.C.C. 328 (1935), as establishing an absolute prohibition of the acquisition of an interest by a railroad in a water carrier. As the court below noted (Pet. App. 17a), all that *Seatrain* established was that the holding of less than a majority of stock or less than a controlling interest could bring Section 11321 into play. The court further pointed out that, despite the railroads' existing minority interest in *Seatrain*, the Commission approved their continuing ownership interest in the water carrier as in the public interest. The court added (Pet. App. 18a):

> Significantly, the Commission did not suggest that it was improper for the railroads to acquire an interest in a competing water carrier first and ask the Commission's approval later.

Thus, even the cases relied upon by petitioner support the Commission's conclusion that the beneficial ownership of water carrier stock, held in an independent, irrevocable voting trust, does not violate Section 11321.

3. Petitioner's contention (Pet. 18) that the decision of the court of appeals will nullify a congressional prohibition of railroad acquisition of water carriers is based on petitioner's refusal to accept the changes that have occurred since the enactment of the Panama Canal Act of 1912. In the Transportation Act of 1940, Congress itself lifted its own prohibition of such acquisitions. Petitioner would have this court "nullify" the 1940 amendment to the Panama Canal Act authorizing rail-water mergers under appropriate conditions. But, as the court of appeals stated (Pet. App. 20a), "Congress clearly expected rail carriers to be able, with ICC approval, to acquire competing water carriers." If petitioner's interpretation were accepted, however, it would be practically impossible to give "meaning and effect to the permission provision" in the 1940 amendment (*id.* at 26a n.28).

4. Petitioner concludes with an argument (Pet. 21-22) that would make sense only if the application and hearing proceeding before the Commission had already taken place. Petitioner refers to "this merger," and to "the transaction [that] has been permitted to proceed" (Pet. 22), and it takes the Commission to task for "permitt[ing] one of the nation's largest railroads to acquire the nation's largest inland water carrier" (Pet. 21). Petitioner simply disregards reality. Now that CSX's application has been accepted for filing by the Commission, the Commission will proceed to conduct a full hearing and then will rule on whether the acquisition is consistent with

the public interest and the Panama Canal Act. CSX is committed to divest itself of the water carrier stock if the merger is disapproved. Petitioner fails to explain how this procedure does not protect its interests as well as a pre-voting trust hearing would. The strictures of the Panama Canal Act will be respected in either case.

Petitioner also vastly exaggerates the problems it faces during the pendency of the Commission proceeding. To begin with, its estimate of "several years" for decision and appeals should be compared to the Commission's commitment that its final decision will be announced in August 1984. Petitioner complains of potential anticompetitive activity during the pendency of the proceeding. It repeats (Pet. 21-22) the Commission's statement (Pet. App. 63a-64a) that the voting trust agreement itself does not prevent anticompetitive action. Petitioner, however, fails to mention the Commission's discussion (*ibid.*) of the remedies available to prevent and punish any violations of the Interstate Commerce Act that might arise. As the court of appeals pointed out (*id.* at 10a) in this regard,

> if CSX were to attempt to influence barge operations notwithstanding the trust, the ICC could act at that time; an injunction was not needed to prevent "speculative future violations."

In short, petitioner will have ample opportunity at the "full hearing" before the Commission to show that its complaints of potential competitive harm from the CSX acquisition of the water carrier are more than speculation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Associate General Counsel

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Interstate Commerce Commission

DECEMBER 1983

APPENDIX

INTERSTATE COMMERCE COMMISSION

DECISION NO. 6

Finance Docket No. 30300

CSX CORPORATION—CONTROL—AMERICAN COMMERCIAL LINES, INC.

Decided: November 29, 1983

On November 4, 1983, CSX Corporation (CSX) and American Commercial Lines, Inc. (ACL) jointly filed an application under 49 U.S.C. 11321, 11343, and 11344 seeking authority for CSX to acquire control of ACL and its certificated water carrier subsidiary American Commercial Barge Lines, Inc. (ACBL). This application was filed under our consolidation regulations applicable to significant transactions, 49 CFR 1180, as modified by Decision No. 3, served October 19, 1983. On November 25, 1983, applicants filed their response to the supplemental information request contained in Decision No. 3. We are accepting the application and supplementary information for filing because they substantially comply with the applicable modified regulations and the requirements of Decision No. 3.

In their response to the supplemental information request, applicants state that full, exact responses to all data requests regarding traffic lanes and market shares are not possible because necessary information is not available either in applicants' records or in public sources. Therefore, applicants have provided information on traffic lanes and market shares based on

their best estimates derived from available data. In view of the data and economic market analysis contained in the application, we conclude that applicants' response to the supplemental information request is adequate. The application and response provide sufficient information to determine whether applicants have established a *prima facie* case. Therefore, the application, as supplemented, is complete and will be accepted for filing.

Pursuant to a tender offer, CSX acquired ACL's corporate parent, Texas Gas Resources Corporation (TGR). CSX and TGR placed ACL's stock in an independent voting trust pending a decision on the control application.[1] If the application is approved, the

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[1] In *Water Transport Association* v. *I.C.C., et al.*, No. 83-1737, United States Court of Appeals for the District of Columbia, decision filed August 4, 1983, the court affirmed our decision, in Finance Docket No. 30215, *Water Transport Association-Petition For Declaratory Order-American Commercial Lines Voting Trust* (not printed), served July 1, 1983, that CSX's ownership of ACL stock held in the voting trust did not violate 49 U.S.C. 11321. In Decision No. 2 in this proceeding, served September 1, 1983, CSX and ACL requested and were granted a protective order allowing CSX and ACL employees and consultants to exchange information during preparation of the control application and the pendency of this proceeding.

On September 20, 1983, the Water Transport Association (WTA) filed a petition to reopen and stay Decision No. 2. WTA argues that the Commission erred in not giving the public an opportunity to comment on the request for a protective order. It also argues that, even if no public comment was necessary, the protective order should have been denied on the grounds that the exchange of operating information between CSX and ACL could have serious anti-competitive effects by spreading confidential data throughout the two companies, thereby violating the trust agreement and section 11321. Finally, the WTA argues that any exchange of information

voting trust will be dissolved and CSX will acquire ACL as a direct subsidiary.

CSX, a non-carrier, is a holding company with rail carrier subsidiaries including the Chessie System railroads, Seaboard System Railroad, Inc., and the Richmond, Fredericksburg, and Potomac Railroad Company. CSX's railroad subsidiaries operate over a 27,000-mile system in 22 States in the East, South, and Midwest.

ACL, through its subsidiaries, is involved in all phases of inland waterway transportation. ACL operates on about 7,500 miles of the nation's inland waterways. These waterways include the Ohio, Illinois, Mississippi, Tennessee, Cumberland, Warrior, and Alabama Rivers and the Gulf Intracoastal Waterway between Florida and Brownsville, TX. Other

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should be stayed pending completion of all appellate proceedings challenging the legality of the voting trust agreement and CSX's acquisition of ACL.

WTA's petition is denied. The purpose of the protective order was to facilitate preparation of the application by determining at the outset how information could be exchanged by CSX and ACL without violating section 11321. Since there was no adjudicatory proceeding at that stage of this proceeding, interested parties did not have a right to comment on the protective order. We conclude that the protective conditions are sufficient to prevent violations of the voting trust agreement or the use of information for anti-competitive purposes. The protective conditions strictly limit employee access to information and what use may be made of it. Further, contact between ACL and CSX personnel was necessary for the timely preparation of the control application. It would have been unreasonable, inefficient and a waste of both the Commission's and the parties' resources to require ACL and CSX to develop and submit their evidence separately. Finally, we will not stay this proceeding on the basis of the WTA's on-going court proceeding.

ACL subsidiaries conduct boat manufacturing and repair businesses and operate riverside terminals.

If the application is approved, CSX will operate its railroad subsidiaries and ACL as a single transportation system performing integrated rail and barge operations. CSX does not plan to abandon any railroad lines as part of the proposed transaction.

The Commission's Section of Energy and Environment has reviewed applicants' Environmental Report and found it to be complete. Information contained in that report suggests that there is no environmental significance in applicants' proposed action. While information yet to be submitted may cause the Section to change its position, it is now anticipated that the environmental consequences of this proposed consolidation will be explained in an Environmental Assessment.

The application and exhibits are available for inspection in the Public Docket Room (Room No. 1221) at the offices of the Interstate Commerce Commission in Washington, D.C.

This proceeding is subject to the statutory time limits set forth in 49 U.S.C. 11345(c) and will be handled under our regulations applicable to significant consolidations set forth in 49 CFR Part 1180, as modified. Accordingly, we intend to complete the evidentiary record by May 30, 1984, and serve the final decision no later than 90 days thereafter.

Any interested person may participate in this proceeding by submitting written comments regarding the application. Comments must be filed no later than January 3, 1984. An original and 20 copies must be filed with the Secretary, Interstate Commerce Commission, Washington, D.C. 20423. Written comments shall be concurrently served by first-class mail on the

United States Secretary of Transportation, the Attorney General of the United States, the United States Secretary of Energy, and applicants' representatives:

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Written comments must also be served upon all parties of record within 10 days of issuance of the service list by the Commission. We plan to issue the service list by January 27, 1984.[2] Any person who files

[2] Issuance of the service list will be within 55 days of the application's acceptance, in accordance with the regulations applicable to major transactions. 49 C.F.R. 1180.4(a)(4). Comments by public parties are not due until 45 days after acceptance of the application. 49 C.F.R. 1180.4(d)(2). Therefore, issuance of a service list within 45 days of acceptance is not possible.

timely written comments shall be considered a party of record if the person's comments so request. In this event no petition for leave to intervene need be filed.

Written comments must contain [49 CFR 1180.4 (d)(1)(iii)]:

(1) the docket number and title of this proceeding;

(2) the name, address, and telephone number of the commenting party and its representative upon whom service shall be made;

(3) the commenting party's position, whether in support of or in opposition to the proposed transaction;

(4) a statement of whether the commenting party intends to participate formally in the proceeding or merely comment upon the proposal;

(5) a list of all information sought to be discovered from applicant carriers;

(6) an initial list of specific protective conditions sought; and

(7) an analysis of the issues the Commission must consider in this proceeding under the applicable statutes and the policies of the antitrust laws.

Because we have determined that the proposal in this proceeding constitutes a significant transaction, railroads and other carriers filing written comments must, in addition to the above information, submit a statement of whether the commenting carrier intends to file inconsistent applications, petitions for inclusion, or trackage rights applications or intends to seek any other affirmative relief requiring the filing of an application with the Commission. *This will be con-*

sidered a prefiling notice without which the Commission will not entertain applications for this type of relief. We are waiving on our own motion the requirements found in our regulations [49 CFR 1180.4 (d)(1)(iii)(I)(1) and (2)] that railroads filing written comments include with their comments copies of existing preferential solicitation agreements and a list of run-through train operations. Commenting railroads and other carriers will have incentives to file such information voluntarily where relevant. We do not seek this information, however, to the extent it is not relevant to the issues in this rail-water carrier proceeding.

Preliminary comments from the Secretary of Transportation, Attorney General, and Secretary of Energy must be sent to the Commission by January 18, 1984.

Parties may modify any of their requested specific protective conditions by filing a second list of protective conditions no later than January 31, 1984. Parties shall not be permitted to seek any protective conditions other than those requested in either their first or second list of protective conditions.

Parties filing responsive applications must do so no later than January 31, 1984. Responsive applications include inconsistent applications, petitions for inclusion, and any other affirmative relief that requires an application to be filed with the Commission (including trackage rights; purchase, acquisition, construction, or operation of a railroad line; pooling or terminal operations; or abandonment of a railroad line). Any responsive applications which are not major are presumed to be significant. Responsive applications must include all supporting evidence in the form of verified statements.

All evidence in opposition to the primary application, in the form of verified statements, is due January 31, 1984. Opposition evidence shall be served on all parties of record and shall be filed (with 20 copies) with the Commission.

All parties representing public bodies, including the Secretary of Transportation, the Secretary of Energy, and the Attorney General, must submit their evidence, in the form of verified statements, supporting their positions no later than March 2, 1984.

Primary and responsive applicants may file evidence in rebuttal to any opposition evidence (including opposing evidence submitted by interveners). Rebuttal evidence shall be due March 28, 1984, and must be served on all parties of record and filed (with 20 copies) with the Commission.

Any impact analyses, traffic studies, and data submitted shall relate to the calendar year January 1, 1981 to December 31, 1981. These data may be supplemented with data from more recent years where available and relevant.

Parties intending to file responsive applications shall file any petitions for waiver, clarification, extension of time, or petitions seeking to rebut the presumption of significant transaction, relating to the responsive applications, with their comments on the primary application. These petitions shall be filed no later than January 3, 1984. Each responsive application filed and accepted (if required) is considered consolidated with the primary application in this proceeding.

CSX and ACL are directed to respond by January 20, 1984, to any information requests contained in the written comments of other parties. Their responses should indicate what information will be voluntarily

supplied and the reasons why the remainder of the information will not be voluntarily supplied. Because of the statutory deadline applicable to this proceeding, we advise all parties to respond to discovery requests promptly. We will not tolerate dilatory tactics or excessive and abusive use of discovery procedures. A refusal to supply information voluntarily will be treated as an objection to discovery. Responses to discovery requests shall be served on all parties of record and 20 copies of these responses shall be concurrently filed with the Commission.

The original and 20 copies of all documents in this proceeding shall be filed with the Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, D.C. 20423.

We will hold oral hearings in this proceeding for the purpose of cross-examination of witnesses submitting verified statements. Hearings will be conducted in four phases. Phase I will relate to applicants' case-in-chief. Phase II will include protestants' evidence in opposition to the primary application and evidence in support of responsive applications. Phase III will embrace the evidence submitted by intervening public parties, including the Secretary of Transportation, the Secretary of Energy, and the Attorney General, and opposition to responsive applications. Phase IV will relate to rebuttal evidence. Hearings will begin on February 7, 1984 and conclude on April 12, 1984.[3]

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[3] Tentatively, Phase I will run from February 7 through 22, 1984. Phase II will run from February 27 through March 13, 1984, Phase III will run from March 19 through 23, 1984, and Phase IV will run from April 2 through 12, 1984. These dates (except for the beginning of Phase I and concluding of Phase of Phase IV) shall be subject to adjustment by the presiding Administrative Law Judge. The Chief Administrative Law

Chief Administrative Law Judge David Allard will conduct the evidentiary proceedings. Within the discretion of Judge Allard, prehearing conferences may be held. If a prehearing conference is to be held, Judge Allard will issue a decision advising the parties of the time and place.

Any interlocutory appeals from rulings by the Judge will be considered by the entire Commission. Interlocutory appeals must be filed within 5 days after the date on which the ruling appealed from was made. Replies must be filed within 3 days after the appeal is filed. Interlocutory appeals must satisfy the requirements of 49 CFR 1113.15.

Post-hearing opening briefs by the parties shall be due on May 11, 1983. Reply briefs shall be due May 30, 1983. If oral argument before the Commission is held, it will take place in late June or early July.

By statute, the evidentiary phase of the proceeding must be concluded by May 30, 1984. The initial decision will be waived and the determination of the merits of the application will be made in the first instance by the entire Commission under 49 U.S.C. 11345.

This decision will not significantly affect either the quality of the human environment or the consumption of energy resources.

It is ordered:

1. The application, as supplemented on November 25, 1983, in Finance Docket No. 30300 is accepted for consideration.

Judge shall have authority to order bifurcation of the hearings if necessary to conclude the evidentiary hearings in a timely manner.

2. The parties shall comply with all provisions as stated above.

3. The WTA petition to reopen and stay is denied.

4. This decision shall be effective on the date of service.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

JAMES H. BAYNE
Acting Secretary

[SEAL]

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No. 83-730

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WATER TRANSPORT ASSOCIATION,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, CSX CORPORATION, TEXAS GAS RESOURCES CORPORATION, and EASTERN COAL TRANSPORTATION CONFERENCE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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QUESTION PRESENTED

The Panama Canal Act ("the Act") provides, *inter alia*, that a railroad may not "own, control, operate or have an interest in" a water carrier with which it "does or may compete." The act vests the Interstate Commerce Commission ("ICC") with exclusive jurisdiction – to be exercised only after a "full hearing" – to (i) determine whether railroads and water carriers "compete" within the meaning of the statute, and (ii) approve otherwise prohibited rail-water consolidations that are found to be in the public interest. Respondent CSX (which owns railroads) made a tender offer for stock of Texas Gas, which owns a barge line. In order to avoid any potential violations of the Act pending completion of the statutory "full hearing" before the ICC, the barge line was placed in an independent voting trust under the control and ownership of an independent trustee. The ICC denied the request of petitioner WTA that the interim use of the voting trust pending hearings be declared an unlawful acquisition by CSX of a prohibited "interest" in the barge line and that the tender offer be enjoined. The question presented is:

Whether the Court of Appeals erred in upholding, as a reasonable administrative implementation of the Act entitled to judicial deference, the ICC's refusal to prohibit use of a temporary, interim voting trust to hold the barge line separate from CSX during the relatively brief period required for the ICC to hold the "full hearing" required by law to determine (i) whether CSX and the barge line "compete" within the meaning of the Act and, if they do, (ii) whether the public interest would be served by CSX's controlling, owning and having an interest in the barge line.

PARTIES

All parties are named in the caption.[1]

[1]In accordance with amended Rule 28.1 of the Rules of the Supreme Court, the subsidiaries and affiliates of CSX Corporation and Texas Gas Resources Corporation are set forth at pp. 1a-3a of the Appendix hereto.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-730

WATER TRANSPORT ASSOCIATION,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, CSX CORPORATION, TEXAS GAS RESOURCES CORPORATION, and EASTERN COAL TRANSPORTATION CONFERENCE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENTS, CSX CORPORATION AND TEXAS GAS RESOURCES CORPORATION, IN OPPOSITION

Respondents, CSX Corporation ("CSX") and Texas Gas Resources Corporation ("Texas Gas"), oppose the petition of the Water Transport Association ("WTA") for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on August 4, 1983.

STATUTES AND REGULATIONS INVOLVED

The principal statutory provision addressed in the petition is section 11 of the Panama Canal Act of 1912, 49 U.S.C. § 11321 (Supp. V 1981), which is reprinted at p. 75a of Petitioner's Appendix. The seldom-invoked Act provides that a rail carrier, or person controlling a rail carrier, may not "own, operate, control or have an interest" in a water carrier with which the rail carrier "does or may compete for traffic." 49 U.S.C. § 11321(a)(1). The ICC may determine whether the Act applies – *i.e.*, whether the carriers in fact do or may compete – only after a "full hearing." 49 U.S.C. §§ 11321(a)(2), (c). The ICC may authorize an otherwise prohibited relationship between a competing water and rail carrier if it finds – also after a "full hearing" – that such relationship "will still allow that water common carrier or vessel to be operated in the public interest advantageously to interstate commerce and that it will still allow competition, without reduction, on the water route in question." 49 U.S.C. §§ 11321(b), (c).

These Panama Canal Act provisions are codified within the Interstate Commerce Act, which vests the ICC with "exclusive" authority over carrier consolidations. 49 U.S.C. § 11341(a) (Supp. V 1981). Before the 1978 recodification of the Interstate Commerce Act without substantive change, section 11341 was codified as 49 U.S.C. § 5(12) (1976), which made clear that the "exclusive and plenary" authority of the Commission extended to all transactions governed by former section 5 – including those arising under the Panama Canal Act, which was then codified as 49 U.S.C. § 5(15)-(17), as set out at p. 79a of Petitioner's Appendix.[2]

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[2]The full text of 49 U.S.C. § 11341(a) and former 49 U.S.C. § 5(12) are reproduced at pp. 4a-5a of the Appendix hereto. Although

Related provisions of the Interstate Commerce Act, 49 U.S.C. §§ 11343-44 (Supp. V 1981), are also applicable to this case. They prohibit consolidation, merger or common control of regulated carriers (including rail and water carriers) without the Commission's prior approval. These provisions are reprinted at p. 81a of Petitioner's Appendix. The Commission has promulgated rules governing independent voting trusts used to hold the stock of a carrier pending ICC hearing and review proceedings under those provisions. The Voting Trust Rules, 49 C.F.R. § 1013 (1982), are reproduced at p. 86a of Petitioner's Appendix.

STATEMENT

A. The Proposed Acquisition

Texas Gas, a diversified energy resources and holding company, owned a subsidiary operating a barge line, American Commercial Lines, Inc. ("ACL"). ACL's operations in 1982 accounted for approximately 10 percent of Texas Gas' revenues. Faced with an "unfriendly" tender offer from Coastal Corporation, at a price its Board of Directors found to be inadequate, Texas Gas entered into an agreement and plan of merger with CSX. The CSX-Texas Gas agreement called for CSX to make a competitive tender offer to Texas Gas shareholders on terms superior to Coastal's.

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the 1978 recodification placed section 11321, the Panama Canal Act provisions, in a different subchapter from section 11341, the relocation of statutory provisions was intended to effect no substantive change in the law. *See* 49 U.S.C. note prec. § 10101 (Supp. V 1981), 92 Stat. 1466, § 3 (1978).

B. The Voting Trust

Recognizing the clear need for ICC approval under the acquisition-of-control provisions of the Interstate Commerce Act, 49 U.S.C. §§ 11343-11344 – and cognizant of potential need for ICC approval under the Panama Canal Act if ACL and CSX were ultimately found to "compete" – the CSX-Texas Gas merger agreement provided that the stock of ACL would be placed in an irrevocable, independent voting trust, pending ICC review. ACL's independence and the regulatory *status quo* would thus be preserved for the period required to give the Commission an opportunity to conduct the "full hearing" required by the Act to determine (i) whether CSX and ACL in fact "do or may compete" within the meaning of section 11321(a) and, if so, (ii) whether the acquisition should nevertheless be approved by the Commission under the public interest standards of section 11321(b).

Under longstanding ICC practice developed under 49 U.S.C. § 11343-44, irrevocable voting trusts may be used to ensure that the stock of a "trusteed" company is to be independently held and voted by a trustee who is free of influence from or business arrangements with the persons placing the stock in trust.[3] The Commission has found such trusts to be a useful and effective means of preserving the regulatory *status quo* during the period needed for full ICC review and, in 1979, promulgated regulations concerning the establishment of voting trusts, their terms, and procedures for submitting them to the agency. *Voting*

[3] *See, e.g.*, B.F. Goodrich Co. v. Northwest Industries, Inc., 303 F. Supp. 53, 61 (D. Del. 1969), *aff'd*, 424 F.2d 1346 (3rd Cir. 1970), *cert. denied*, 400 U.S. 822 (1971).

Trust Rules, 44 Fed. Reg. 59,908 (1979), 49 C.F.R. § 1013.[4]

The CSX-Texas Gas voting trust agreement was drafted in accordance with the ICC's Voting Trust Rules and subject to Commission oversight. Well before the effective date of the CSX tender offer, CSX and Texas Gas advised the Commission of the proposed acquisition of ACL, stated CSX's commitment to apply for any necessary ICC approvals "as soon as practicable," and submitted a proposed voting trust agreement designed to insulate ACL from CSX during the approval process. (Petition ("Pet.") at 7a.) The parties modified the voting trust agreement in accordance with the suggestions of the ICC's Office of Proceedings, which subsequently issued an informal opinion that the voting trust arrangement "effectively insulates Texas Gas and Resources, as well as CSX, (if CSX should acquire control of Resources), from being able to exercise control over ACL." (Pet. at 8a, 106a.)

The voting trust agreement, which incorporates the ICC's regulations by reference, vests exclusive power to vote ACL's stock in the trustee, Midlantic National Bank. (Pet. at 7a, 91a-92a.) To "maintain [the trustee's] complete

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[4]The ICC's practice is consistent with that of other administrative agencies, which authorize the use of voting trusts as temporary devices to hold companies separate while the agency considers the proposed transaction under the pertinent statutory review procedure.

The Civil Aeronautics Board is one such agency. *See, e.g.,* Seaboard World Airlines, Inc. v. Tiger International, Inc., 600 F.2d 355, 365 (2d Cir. 1979). The Federal Communications Commission has permitted the use of voting trusts to secure waiver of the agency's cable television cross-ownership rules, which prohibit a cable television system from having "an interest in" certain types of television broadcasting stations. 47 C.F.R. § 76.501(a); *see, e.g.,* Westinghouse Broadcasting Co., Inc. and Teleprompter Corp., 84 F.C.C.2d 938 (1981).

independence" from CSX and Texas Gas (49 C.F.R. § 1013.1(b)), the agreement prohibits the trustee from having other business relations or disqualifying investments. (Pet. at 91a, 97a.) The trustee is forbidden from acts creating dependence or intercorporate relationships between ACL and CSX/Texas Gas, and the trust is irrevocable without ICC approval. (Pet. at 92a, 97a.) The effect of the trust is to obligate the trustee to "vote the stock in the best interests of [ACL]" rather than CSX or Texas Gas, and ACL's management reports and is responsible to the trustee. (App. 58a-59a.) The Agreement expressly provides for prompt divestiture of ACL, under specified procedures and to persons unaffiliated with CSX or Texas Gas, in the event the Commission should disapprove CSX's application to own or control the barge line. (Pet. at 95a-96a.)

C. The Commission Decision

WTA petitioned the ICC for an order declaring that the interim voting trust would violate the Panama Canal Act, even if used only as a temporary device pending completion of the Commission hearings on the proposed CSX-ACL transaction. WTA did not request an evidentiary hearing, but instead asked that its arguments be "incorporated into the record" in the full hearing on CSX's application to acquire ACL.

The ICC denied WTA's petition for declaratory order in a comprehensive and careful analysis of WTA's arguments, the Act, its legislative history and the Commission's prior decisions. (Pet. App. at 51a-67a.) The agency did not reach the question of whether CSX and ACL "compete" within the meaning of the Act and, if so, whether their relationship should be approved under the

public interest standards of section 11321(b).[5] Instead, the Commission concluded that the temporary, independent voting trust established by CSX and Texas Gas for the period of ICC review, in accordance with the standards set forth in the Voting Trust Rules, does not create a rail-water relationship of the sort prohibited by the Panama Canal Act.

The ICC stressed that, pending completion of its hearing procedures, the voting trust was "merely a temporary device designed to avoid a technical violation of the law in the context of a corporation acquisition." (Pet. at 66a.) Applying its experience with similar voting trusts used to preserve the regulatory *status quo* pending ICC review under the acquisition-of-control provisions, 49 U.S.C. § 11343-44, the agency reasoned that the interim voting trust here would succeed in its critical role of preserving ACL as an independent competitor, uninfluenced by CSX, during the ICC hearings on the proposed acquisition. (Pet. at 57a-67a.) The Commission warned that any efforts by CSX to subvert the independence of the voting trust, or to affect rail-water competition, could be promptly remedied. (Pet. at 64a and n.5, 66a.) Finally, the Commission pointed out that WTA would have ample opportunity to submit any evidence and make any arguments relevant to the proposed acquisition and the Pan-

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[5]Sections 11321(a)(2) and (c) require the Commission to conduct a "full hearing" *before* determining whether there is "competition" between ACL and CSX invoking the Act under section 11321(a), and whether the transaction merits approval under section 11321(b). Accordingly, the Commission simply "reject[ed] WTA's argument that an independent voting trust *as a matter of law* cannot insulate a carrier from its acquired 'interest' in a water carrier in the same manner as a voting trust is said to insulate a carrier from 'control' of another carrier on an interim basis pending final action in a section 11343 proceeding." (Emphasis supplied.) (Pet. at 65a.)

ama Canal Act in the subsequent proceedings on CSX's application to acquire ACL. (Pet. at 66a-67a.)

D. The Court of Appeals Decision

WTA filed its petition for review in the Court of Appeals on July 7, 1983. The panel's majority opinion of August 4, 1983 (Wald and Scalia, JJ.) affirmed the ICC's decision as a reasonable implementation of the Act. (Pet. at 1a-32a.)

The Court upheld the Commission's refusal to prohibit use of a temporary voting trust as entirely consistent with "the dual purpose of the Panama Canal Act to permit some rail-water mergers while preserving vigorous water competition." (Pet. at 29a.) In doing so, the panel majority noted the decisions of this Court calling upon reviewing courts to pay due deference to the construction by administrative agencies of their governing statutes. (Pet. at 24a-25a.) The Court of Appeals found that neither the Act's language nor its legislative history indicates that Congress has ever focused upon *"when* – before or after the acquisition – the ICC would determine the existence or absence of competition in the event a rail carrier proposed to buy a water carrier." (Pet. at 14a, 20a.) Congress' decision to amend the Act in 1940, the Court concluded, clearly expressed a policy favoring rail-water acquisitions meeting the public interest standards now codified at section 11321(b). (Pet. 18a-20a.) The Court accordingly reasoned that it would defeat the purpose of the Act as a whole to forbid – as an "interest" prohibited by the Act – an interim voting trust established to insulate a water carrier from a rail carrier pending the statutory "full hearing" necessary to determine whether the carriers "compete" and, if so, whether their consolidation should be approved. (Pet. at 25a-29a.)

WTA's sweeping, literalistic interpretation of "interests" prohibited by the Act ignored the practical problem that carriers need to establish some form of contingent relationship in order to propose a concrete transaction to the ICC for review. Without "*some* minimal leeway" in the statutory interest prohibition, the Act's provisions permitting rail-water consolidations would become a "dead letter" because of the inability of parties to present reasonably defined transactions for ICC approval. (Pet. at 25a, 27a n.30.) The Court found support for use of an interim voting trust in past ICC cases in which rail carriers had never been regarded as acquiring prohibited "interests" in water carriers when entering into elaborate purchase contracts submitted for ICC approval. (Pet. at 25a-29a.) In response to WTA's own argument that such contractual arrangements should have been used by CSX and Texas Gas, the Court found the "interests" created under the voting trust here to be essentially indistinguishable from those inherent in a purchase agreement. Both in equal measure permit the ICC to conduct its hearing process while preserving the water carrier's ability and incentive to compete with the rail carrier. (Pet. at 27a-29a.) The Court also recognized that purchase contracts are not practical in circumstances such as were involved here.[6]

The dissenting opinion (Greene, Harold, J.), whose points were addressed specifically by the majority, concluded that the Act left no room for the Commission to do

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[6]The Court of Appeals noted the particular need for devices such as the voting trust where other arrangements are unavailable. Thus it observed that to forbid such trusts "would foreclose the common acquisition device of the tender offer," the only method by which CSX could have acquired Texas Gas in the face of Coastal Corporation's competing tender offer. (Pet. at 29a.)

anything but forbid use of a voting trust prior to completion of a "full hearing." Notwithstanding the broad and exclusive jurisdiction over carrier consolidations confided to the ICC, the dissent saw no basis for deferring to the Commission's implementation of the Act in the circumstances here. The dissent proceeded in major part on the view that the ICC might not be sufficiently vigilant in guarding against competitive abuses during the time required for hearings; that CSX and ACL would ultimately be found to "compete" within the meaning of the Act; and that the proposed consolidation of ACL and CSX would adversely affect competition and should ultimately be disapproved after hearings. (Pet. at 43a-45a, 49a-50a.)

E. ICC Proceedings Since the Court of Appeals Decision

The Court of Appeals and this Court denied WTA's requests for stay. (Pet. 108a-11a.) The Court of Appeals also denied WTA's petition for rehearing and its suggestion for rehearing *en banc*. (Pet. 71a-74a.) CSX's tender offer for Texas Gas stock was consummated on August 6, 1983, shortly after all ACL stock was placed in the voting trust.

The statutory "full hearing" process is already underway. In accordance with the 90-day deadline undertaken by CSX before the Court of Appeals (Pet. at 7a n.5), CSX and ACL filed a detailed, multi-volume application (including direct evidence in written form) with the Commission on November 4, 1983. In accordance with an ICC order issued on October 19, 1983, CSX and ACL have also submitted extensive additional information bearing chiefly on questions concerning the potential impact on competition if an ACL-CSX consolidation should be approved.

After submission of comments from interested governmental agencies and protesting parties, discovery and submission of additional written evidence, there will be oral hearings. The Commission is required by law to complete its hearings on or before June 4, 1984, and to render a decision no later than September 4, 1984. *See* 49 U.S.C. § 11345(c)(3).

Throughout the hearing process, CSX and ACL are bound by a "protective order" issued by the ICC on August 30, 1983. That order establishes detailed procedures restricting the interchange of competitive information between ACL and CSX in the application and hearing process. WTA has indicated that it will participate vigorously in the hearing process, having already submitted six pleadings to the Commission. It will doubtless take advantage of its right to protest the CSX-ACL application under 49 U.S.C. §§ 11345(c)(1) and 11321(b), and to present its own evidence, cross-examine witnesses, and advance legal arguments.

REASONS FOR DENYING THE WRIT

The petition does not satisfy any of the criteria for review by writ of certiorari. The Court of Appeals upheld, in a thorough and well-reasoned decision, the order of an expert administrative agency vested with "exclusive" jurisdiction over carrier consolidations. The Commission's order does no more than permit use of a temporary, interim voting trust to preserve the regulatory *status quo* during the statutory hearing process that is already underway. The ICC's essentially procedural order represents a thoughtful implementation of the Panama Canal Act that fully accords with its policy and protects the integrity of

the statutory hearing procedures for determining the substantive issues arising under the Act.

The decision below conflicts with no decision of this or any other court and raises no important question of federal law. The Panama Canal Act has seldom been invoked during its 70 years and has been the subject of even fewer judicial decisions. There have been only a handful of reported ICC cases in which rail carriers have sought approval to acquire water carriers, and in none of these cases was the ICC's decision the subject of judicial review. (Pet. at 6a n.3, 21a-23a.) Apart from the CSX-ACL case, there are no other applications or proposed transactions involving rail and water carriers presently before the ICC.

The Court of Appeals decision accords fully with this Court's precedents requiring reviewing courts to pay due regard to the role of administrative agencies in applying their governing statutes to the cases before them. Far from violating the National Transportation Policy (Pet. at 18-23), the decision below properly recognizes that it is the ICC – through the statutory hearing process that has already begun – which in the first instance must determine on a full evidentiary record whether the CSX-ACL transaction should be authorized. WTA seeks review of what is essentially a preliminary procedural order. The issues of competition and the public interest – which are the real concern of the Act – will be fully developed before the Commission, and the ICC's decision will be subject to judicial review after it concludes evidentiary hearings. During this period of intense scrutiny the voting trust will insulate ACL from any competitive influence by CSX.

A. The Decision Below Affirms the ICC's Reasonable Implementation of the Panama Canal Act in a Manner Fully Consistent With Precedent.

WTA's petition is premised on the view that the Panama Canal Act evinces so strong an antipathy toward potential relationships between rail and water carriers as to require suspension, in this instance, of the usual principles governing judicial review of agency decisions. WTA's strained and literalistic interpretation of the Act insists that a temporary voting trust, established under ICC scrutiny for the purpose of preserving the regulatory *status quo* during statutory hearings, gives CSX a prohibited "interest" in ACL because those same statutory hearings have not yet taken place. In addition to assuming what must be proved in the hearing process itself (*i.e.*, that ACL and CSX "compete" within the meaning of section 11321(a)),[7] WTA's argument would substantially undermine the ICC's practical opportunities to administer the provisions of the Act permitting rail-water combinations.

The Court of Appeals properly recognized that it is the "dual purpose of the Canal Act to permit some rail-water mergers while preserving vigorous water competition," (Pet. at 29a), and that Congress had not "focused on the question of *when*" the hearing must be completed (Pet. at 14). Congress' 1940 amendment to the Act, which authorizes the ICC to approve rail-water relationships that are found to be consistent with the public interest, plainly

[7]Throughout the petition, WTA simply assumes that CSX and ACL "do or may compete" within the meaning of section 11321(a)(1), ignoring that a statutory "full hearing" is required to make this determination. Thus, in its Question Presented and elsewhere, WTA characterizes the Act as preventing *any* rail-water relationships whatsoever, without regard to the question of the impact on competition.

expresses a policy favoring such transactions. Yet the unduly broad interpretation of prohibited "interests" advanced by WTA would effectively preclude rail and water carriers from establishing even those minimal, attenuated and contingent relationships necessary to propose more than mere hypothetical transactions for ICC approval. As the Court of Appeals recognized, "A railroad and a water carrier are unlikely to embark on the long and costly process of seeking ICC approval without a definitive merger agreement." (Pet. at 25a.) If the ICC's jurisdiction to consider proposed consolidations of rail and water carriers is to have practical meaning, there must be means of presenting a real, concrete transaction that will actually be implemented if it receives approval from the Commission. The Court of Appeals and Commission sensibly harmonized the Act's interest and ownership prohibition (§ 11321(a)(1)) with its "full hearing" requirement and authorization provisions (§ 11321(a)(2), (b), (c)): if there is to be the hearing process contemplated by statute, "there must be *some* minimal leeway in § 11321(a)(1)'s proscription of ownership or interest, or else the merger authority of § 11321(b) becomes a dead letter." (Pet. at 27a n.30.)[8]

There was all the more reason for the Court below to accept the Commission's reasoned judgment permitting the

[8]The practical difficulties of fulfilling the statutory "full hearing" requirement without the temporary voting trust to maintain the *status quo* pending review are illustrated by the circumstances of this case. Because of the competing hostile tender offer by Coastal Corporation for Texas Gas, CSX could not have acquired Texas Gas without using the tender offer device, which would have been foreclosed without the availability of an interim voting trust to insulate ACL from CSX pending ICC hearings. The ICC properly adapted a proven mechanism to this situation to guard against the harm Congress intended to prevent – interference by railroads with rail-water competition – while the Commission conducts the "full hearing" on the proposed acquisition mandated by the Act.

temporary CSX-ACL voting trust because (i) it was established openly and in accordance with the agency's voting trust regulations, and (ii) the Commission expressly retained its "authority to remedy any attempted abuse of the trust." (Pet. at 28a n.32.) The ICC's familiarity with voting trusts and confidence in their integrity arises from many years of experience with them in carrier consolidations proposed under 49 U.S.C. §§ 11343-44. Furthermore, as the Court rightly observed, the purchase contracts used to preserved the regulatory *status quo* in past Panama Canal Act cases create no lesser "interest" than that created by the voting trust.[9]

WTA does not argue – nor could it – that the decision below conflicts with any other judicial construction of the Act. The Court below found only two "directly relevant" ICC decisions since the 1940 amendment of the Act, both of which involved purchase contracts submitted for Commission approval, and neither of which were subjected to judicial review. (Pet. at 21a-22a.) In both of the leading judicial decisions interpreting the "full hearing" requirement, the courts have refused to enjoin or set aside ICC orders on the mere allegation that the Panama Canal Act was about to be violated; each decision held that no such determination could be made in advance of the Commis-

[9]WTA's conception of "interest" prohibited by the Act would preclude *any* pre-approval commercial relationship established subject to ICC review, no matter how attenuated, including the purchase contract which it admitted below to be permissible. (Pet. at 25a, 27a n.30.) The Court of Appeals properly concluded that there is no reasoned basis for distinguishing between a purchase contract and a temporary voting trust, given the purpose of the Act. (Pet. at 25a-29a). In *both* cases, the rail carrier's motivation and opportunity to influence the water carrier's operations are checked by the short duration of the purchase contract or voting trust, the public and agency scrutiny during the hearing process, and the threat of ICC disapproval of the acquisition. (Pet. at 27a-28a.)

sion's own completion of the "full hearing" required by the statute. *See Bison Steamship Corp.* v. *United States,* 182 F. Supp. 63, 68-69 (N.D. Ohio 1960) (three-judge court); *Union Mechling Corp.* v. *United States,* 566 F.2d 722, 725-26 (D.C. Cir. 1977). WTA's assertions that past ICC decisions support its position (Pet. at 12-13) were specifically rejected by both the Commission and the Court of Appeals. (Pet. at 17a-18a, 23a n.25; 57a-59a.)

The decision of the Court of Appeals was also faithful to this Court's affirmation of the exceptionally broad authority Congress has confided in the ICC over carrier consolidations:

> "[T]he Commission may adapt [former section 5] to the actualities and current practices of the industry involved and apply it to the extent it feels necessary to protect its jurisdiction . . . without having to return to Congress for additional authority every time industry practices change." *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115, 125 (1962).

Here, the Commission has exercised its "exclusive" regulatory authority in a responsible manner consistent with use of a tender offer – an "industry practice" virtually unknown to Congress in 1912 when the Panama Canal Act became law.[10]

[10] In other contexts, Congress has struck the regulatory balance so as not to subject tender offers to unreasonable and unnecessary delays and interference. *See* Edgar v. MITE Corp., 457 U.S. 624, 635-40 (1982). Similarly, here the ICC has implemented the Panama Canal Act consistently with its policy of avoiding interference in the

WTA's petition, in sum, ignores the deference due the ICC's sensible and reasoned decision in this case. *EPA* v. *National Crushed Stone Ass'n,* 449 U.S. 64, 83 (1980); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). Such deference is due particularly under a statutory scheme according the Commission exclusive jurisdiction over carrier consolidations, 49 U.S.C. § 11341(a), as the Court of Appeals expressly noted (Pet. at 24a n.26). The ICC's decision is not inconsistent with any other decision interpreting the Panama Canal Act, and the Commission took into account appropriate policy considerations in implementing the statute. *Id.; see, e.g., Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.,* 454 U.S. 27, 37 (1981).

There is no reason to review on certiorari the Court of Appeals' affirmance of an administrative decision that is fully in accord with established rules of administrative law and which reasonably implements the governing statute. Nor does the Commission's essentially procedural decision, which permits full development of all pertinent substantive issues in the statutory hearing process, raise any important questions meriting this Court's consideration.

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marketplace (*see* Pet. at 51a-52a), and the Court of Appeals found support for the Commission's construction of the Act in the congressional policy of the Staggers Act " 'to minimize the need for Federal regulatory control over the rail transportation system.' 49 U.S.C. § 10,101(a)(2)." (Pet. at 29a.)

B. WTA's Continuing Requests for Judicial Intervention Before Completion of the ICC's Hearing Process are Inconsistent with the National Transportation Policy.

WTA contends that the Court of Appeals decision "will substantially impair the National Transportation Policy." (Pet. at 18.) The opposite is true.

The ICC, which is the expert agency charged by Congress to implement the National Transportation Policy, has already begun evidentiary proceedings on the proposed CSX-ACL transaction. CSX and ACL have already submitted voluminous application and evidentiary materials; other parties in interest may do the same. In those proceedings, WTA may present all its legal and factual objections to the acquisition, may propose dissolution of the voting trust, and may request divestiture of the ACL stock to persons other than CSX. There could be no basis for judicial intervention before the ICC has had the chance to determine whether CSX-ACL transaction is in the public interest, particularly where there will be ample opportunity for judicial review on a full record after the ICC completes its hearing process.

WTA seeks to stop the hearings in their tracks, despite the ICC's "exclusive" jurisdiction over carrier consolidations, 49 U.S.C. § 11341(a). WTA ignores that the "mandate to achieve a balance between competing forms of transportation [set out in the National Transportation Policy] is directed not to the courts but to the Commission." *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658, 673 (1963). Contrary to WTA's apparent view, this Court has explained that "the National Transportation Policy is [not] a set of self-executing principles that inevitably point the way to a clear result in each case. On the contrary,

those principles overlap and may conflict, and, when this occurs, resolution is the task of the agency that is expert in the field." *Schaffer Transportation Co. v. United States,* 355 U.S. 83, 92 (1957).

While the Commission here performs the task Congress has confided to it, competition will be fully protected by the voting trust established according to the ICC's regulations, under its supervision, and subject to the ICC's intervention if there is abuse. WTA has not shown and certainly could not show that ACL is disabled as a competitor or that the water carrier industry will be harmed in this interim period. Judicial intervention pending ICC review is inappropriate in these circumstances. *See Arrow Transportation Co.* v. *Southern Ry. Co., supra,* 372 U.S. at 673.

As was the case below, WTA seeks a judicial determination that the Panama Canal Act has been violated, and that a CSX-ACL combination would endanger competition, on the basis of two maps attached to its petition (Pet. at 89a, 90a) and the proposition that both CSX and ACL are large carriers. (Pet. at 22.) Such comparative map exercises and conclusory descriptions do not begin to frame even the broad outlines of the detailed and specialized competitive analysis mandated under the Act. The Commission must consider a host of factors, including not merely the areas served by the carriers, but also "the nature of the traffic service differences, prevailing rate differences, or extremely circuitous routing of either the rail route or water route." *Southern Ry. Co. Section 5(5) Application,* 342 I.C.C. 416, 435 (1972), *aff'd sub nom., American Waterways Operators, Inc.* v. *United States,* 386 F. Supp. 799, 806 (D.D.C. 1974) (three-judge court), *aff'd per curiam,* 421 U.S. 1006 (1976).

In the final analysis, WTA's objection in this case involves the *timing* of the ICC hearings, a question of agency procedure. Such matters are peculiarly within the administrative discretion, under "very basic tenet[s] of administrative law" enunciated by this Court. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 524-25, 543-44 (1978). WTA's rhetoric that the Court of Appeals decision "nullifies the Congressional mandate" and "will substantially impair the National Transportation Policy in favor of a strong independent water carrier industry" (Pet. at 23) must be seen for what it is: an attempt to avoid altogether the full ICC hearing required by law to determine whether CSX's proposed affiliation with ACL is in accordance with the Congressional intent and consistent with the National Transportation Policy.

CONCLUSION

WTA offers no significant basis for review under the standards set forth in Rule 17 of this Court's Rules or under any other standard for granting a writ of certiorari. There is no conflicting judicial or administrative decision under the seldom-invoked statutory provisions involved here. No important question of federal law is presented by the Commission's essentially procedural order, which represents precisely the kind of reasonable agency implementation of law entitled to deference by reviewing courts. The regulatory *status quo* is fully preserved by the independent voting trust while the ICC conducts the statutory "full hearing" in which all substantive issues will be fully canvassed. Any party, including WTA, may seek judicial review based upon a full evidentiary record after the Commission has completed its review and rendered findings.

The petition for a writ of certiorari should accordingly be denied.

Respectfully submitted,

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APPENDIX

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SUBSIDIARIES AND AFFILIATES OF CSX CORPORATION AND TEXAS GAS RESOURCES

Subsidiaries and affiliates of CSX Corporation include: CSX Beckett Aviation, Inc.; CSX Minerals, Inc.; CSX Resources, Inc.; The Chesapeake & Ohio Railway Company; The Baltimore & Ohio Railway Co.; Florida Publishing Co.; The Greenbrier Hotel, CSX Hotels, Inc.; Richmond, Fredericksburg & Potomac Railroad Co.; Seaboard Coast Line Railroad; Carolina Clinchfield & Ohio Railway; Louisville & Nashville Railroad; The Lake Erie and Detroit River Railway Co.; Western Maryland Railway Co.; Augusta & Summerville R.R. Co.; Central Railroad Co. of South Carolina; Chatham Terminal Co.; Duval Connecting R.R. Co.; Gainesville Midland Railroad Co.; Norfolk & Portsmouth Belt R.R. Co.; North Charleston Terminal Co.; The Seacoast Transportation Co.; Winston-Salem Southbend Ry. Co.; Fort Myers Southern RR Co.; Atlantic Land & Transp. Co.; Seaboard Tampa Investment Co.; First Georgia Development Co.; Beaver Street Tower Co.; Seaboard Coast Line Railway Supplies, Inc.; Cybernetics & Systems, Inc.; Evansville Corp. R.R. Co.; Evansville Connecting R.R.; Woodstock & Blackton Ry. Co.; Paducah & Illinois R.R.; Richmond Land Corp.; Fruit Growers Express Co.; Allegheny and Western Railway Co.; Western Railway of Alabama; Chicago South Shore & South Bend Railroad; Covington & Cincinnati Inter-Terminal Railroad & Transfer & Bridge Co.; The Cincinnati Inter-Terminal Railroad Company; The Lake Erie and Detroit River Railway Co.; The Baltimore and Ohio Chicago Terminal Railroad Company; Buffalo, Rochester & Pittsburgh Railway Company; Clearfield & Mahoning Railway Com-

pany; The Cincinnati, Indianapolis & Western Railroad Company; Dayton and Michigan Railroad Company; Dayton & Union Railroad Company; The Home Avenue Railroad Company; The Staten Island Railroad Corporation; The Winchester and Potomac Railroad; The Winchester and Strasburg Railroad; Baltimore & Cumberland Valley Railroad Extension Co.; Washington and Franklin Railway; The Central Railroad Company of South Carolina; Columbia, Newberry and Laurens Railroad Company; Gainesville Midland Railroad Company; Georgia Railroad; Georgia Railroad and Banking Company; South Carolina Pacific Railway Company; Tampa Southern Railroad Company; Savannah River Terminal Company; The Carrollton Railroad; Louisville, Henderson & St. Louis Railway Company; Nashville & Decatur Railroad Company; Western & Atlantic Railroad; Carolina, Clenchfield & Ohio Railway of South Carolina; Holston Land Company, Incorporated; Atlanta & West Point Railroad Company; Richmond-Washington Company; Richmond, Fredericksburg & Potomac Railroad Company.

Subisidiaries of Texas Gas Resources include: Texas Gas Transmission Corporation; American Commercial Lines, Inc.; Amcom, Inc.; American Commercial Barge Line Company; American Commercial Credit Corporation; American Commercial Leasing Company, Inc.; American Commercial Terminals, Inc.; Bauer Dredging Co., Inc.; Commercial Barge Line Company; Inland Terminals, Inc.; Inland Tugs Co.; Jeffboat, Incorporated; Louisiana Dock Company; Mac Towing, Inc.; Waterway Communications System, Inc.; Culbac Corporation; Ferma Gro Corporation; Indiana Gas Utility Corporation; Ken-Tex Energy Corporation; Texas Gas Transmission Limited; Texas Offshore Gas Transportation, Inc.; Texas

Gas Alaska Corporation; Texas Gas Development Corporation; Texas Gas Synfuel Corporation; TXG Resources, Inc.; The Cresset Corporation; Texas Gas Exploration Corporation; Texas Gas Exploration (U.K.) Corporation; Texas Gas Exploration (U.K.) Limited; Texas Gas Exploration (Australia) Corporation; Texas TransAgra Corporation; Mineral Properties, Inc.; Texas American Corporation; Texas Gas Exploration Arctic, Limited.

49 U.S.C. § 11341(a) (Supp. V 1981)

§ 11341. Scope of authority

(a) The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

49 U.S.C. § 5(12) (1976)

(12) Plenary nature of authority under section

The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with

the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any powers granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.